Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ALCOA INC. and VANALCO, INC.,

Petitioners,

v.

BONNEVILLE POWER ADMINISTRATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Has either of the lower courts jurisdiction to consider whether the Bonneville Power Administration can condition the sale of power to industrial users by requiring that they abandon their First Amendment right to petition any branch of the government, including specifically the Congress?

RULE 14.1(b) AND 29.6 STATEMENT

Alcoa Inc., Petitioner here, is the largest aluminum producer in America; Vanalco, Inc., the second Petitioner here, is one of the other smaller aluminum companies. However, nine other members of Direct Service Industrial customers (DSIs) (including six other aluminum producers), public and investor-owned utilities, and electrical cooperatives all throughout the Pacific Northwest would be indirectly affected by the determination here.

Alcoa Inc. has no parent company; subsidiaries in which it has less than 100 percent interest are listed in Appendix G. Vanalco, Inc. has no parent company and no non-wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully ask this Court to issue a writ of certiorari to review two related judgments of the United States Court of Appeals for the Ninth Circuit in this case. The two Petitioners each filed original actions in the court of appeals and also two appeals from the district court on the same subject. The original petitions were affirmed on February 9, 2000, Orders No. 99-71188 and No. 99-71189; and the appeals were summarily affirmed, No. 99-36213 and No. 00-355009

OPINIONS BELOW

The two opinions (orders) of the Court of Appeals (Appendix A and B, *infra*) are not reported. The opinion of the district court in one of those cases (Appendix C, *infra)* is not reported.

JURISDICTION

The judgments of the Court of Appeals were entered on February 9, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

The Bonneville Power Administration (BPA) supplies power to several groups of purchasers in the Pacific Northwest. The users involved here are the Direct Service Industrial customers (DSIs) of whom there are eleven. Most of these are aluminum producers; Alcoa Inc. (Alcoa), Petitioner here, is the largest. The second Petitioner, Vanalco, Inc. (Vanalco), is one of the smaller companies. As is more fully set forth in the Statement of

Facts, BPA is in the midst of a rate hearing. Petitioners seek to stay the closing of that hearing to maintain the status quo while the Court decides whether a lower court has jurisdiction to consider Petitioners' request for temporary relief. The instant action was filed by Vanalco on September 14, 1999, and by Alcoa on September 15, 1999, directly in the Ninth Circuit Court of Appeals; the cases were consolidated on October 13, 1999. Alcoa filed a companion case in the Western District of Washington on October 8, 1999, to protect Petitioners' rights should circuit court jurisdiction be held inappropriate.

The district court dismissed the action in the belief that jurisdiction was in the circuit court, and, hence, it had no jurisdiction. *See* Order of December 7, 1999, Appendix C. That order was appropriately appealed to the Ninth Circuit, which dismissed the appeal summarily on February 9, 2000; *see* Appendix A.

Original jurisdiction in the Court of Appeals was also declined on February 9, 2000, on the authority of that court's earlier opinion in *Public Utility Comm'r v. Bonneville Power Admin.*, 767 F.2d 622, 628 (9th Cir. 1985); *see* Appendix, Exhibits B and D.

Taken together these orders hold that no court has jurisdiction to hear in the first instance Petitioners' claims of irreparable First Amendment injury. This Petition is taken from these orders of the Ninth Circuit. This Court has jurisdiction under 28 U.S.C. § 1254(1).

A stay pending consideration of this Petition has been granted by the Ninth Circuit panel, which had entered the orders under review here.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 9(e)(5) of the Northwest Power Act (16 U.S.C. § 839(f)(e)(5), first sentence, states:

> Suits to challenge the constitutionality of this chapter, [OR] any action thereunder, final actions and decisions taken pursuant to this chapter by the Administrator or the Council, or the implementation of such final actions, . . . shall be filed in the United States court of appeals for the region. (Emphasis added).

STATEMENT OF FACTS

BPA furnishes power for a large number of users, including many public bodies, in the Pacific Northwest. Among the customers are the DSIs, the group involved here. There are eleven DSIs, of which eight are aluminum companies, including Petitioners.

BPA has embarked on a rate-making process. That process covers not only the price at which it will sell power, but also the quantities that will be sold. If the DSIs need more power than BPA sells, they must buy it from other sources, normally at a higher price. Approximately 30 percent of the cost of producing an aluminum product is for power.

BPA was created as a result of the 1937 Bonneville Project Act (16 U.S.C. §§ 832-832m). That Act has been modified or expanded many times, most prominently with the Pacific Northwest Consumer Power Preference Act of 1964 (16 U.S.C. §§ 837-837h), the Pacific Northwest Federal Transmission System Act of 1974 (16 U.S.C. §§ 838-838k), and the Pacific Northwest Electric Power Planning and Conservation Act of 1980 (16 U.S.C. §§ 839-839h (the "Northwest Power Act")).

The various purchasers of power, DSIs and others, have a long history of tensions with BPA. Since BPA is a major producer in the country and a federal agency created by Congress, these tensions may result in petitions to Congress by the DSIs or others. The DSIs have actively engaged Congress in the evolution of BPA's authority, especially during and after passage of the Northwest Power Act. They have advocated deregulation and other legislative proposals. *See* Appendix E, Affidavit of Jack Speer.

BPA expects to complete its current hearings and announce its results on April 21, 2000. Its conclusions will then be subject to direct review by the Federal Energy Regulatory Commission (FERC), which may take a considerable time. However, the record will be closed, albeit subject to review, after the April 21 date.

Alcoa will need to enter into power contracts with suppliers other than BPA for power it would prefer to purchase at the less expensive BPA rates, and it will probably be unable to undo those contracts, even if an eventual decision by a court of review results in a ruling that BPA should have made larger allocations of power to

Alcoa and at lower rates. In any such case, if BPA eventually is ordered to give Alcoa a larger power allocation, it will be able to do so by only purchasing market-based power; it already will have sold all its cost-based power. *See* Affidavit of Jack Speer, Appendix E.

Contracts to purchase power from BPA must be signed within the "subscription window," commencing with the conclusion of BPA's rate case on April 21, 2000, and lasting for 120 days thereafter. Thus the quantity and price of power will be cemented by contract before FERC can complete its review.

BPA began dealing with rate issues by two extraordinary devices. Both preceded and were separate from the statutory rate-making process. The first was a decision to use a "subscription process" (the details of which were fixed by a Subscription Record of Decision ("Subscription ROD")) whereby BPA decided important issues normally reserved for the rate case itself, including what it would allocate for fish and wildlife conservation. BPA's second decision, with respect to the DSIs, was to enter into an agreement that became known as the Compromise Approach. Most of the DSIs, including all the aluminum companies except Petitioners, acquiesced in BPA's offer. The Compromise Approach involves fixing the amount of power, and its price, to be available to the DSIs as the BPA initial proposal in the rate case "if the DSIs are willing to support it." *See* Appendix F, Compromise Approach.

The precise details of the support are that the aluminum companies and other DSIs "will support the Compromise Approach throughout the rate case" as long as it

is on the table. The aluminum companies must also support the proposal "in discussions outside the rate case venue," which is to say that the aluminum companies "may describe publicly" the position which they are required to take in the rate case, *but that is all*. The DSIs also were required to, and did, agree that they will support BPA's proposal for treatment of a special class of users, the Investor-Owned Utilities (IOUs) and not contest it. The DSIs in accepting this plan also agreed that they "will not legally challenge the compromise approach" if it is sustained in the rate case. They further agreed to dismiss any court challenge to the Subscription ROD if the Compromise Approach is sustained in the rate case.

This "compromise" prevents political speech in Congress. BPA acknowledged in the rate case that the Compromise Approach required the signers "to refrain from certain actions . . . both locally and in Washington D.C."[1] Indeed, BPA documents in evidence in the rate case demonstrate that a goal in negotiating the Compromise Approach is "to stop heavy lobbying in Washington, D.C." by the DSIs. *See* Appendix E, Affidavit of Jack Speer. The BPA is, thus, expressly and deliberately, seeking to restrain the users from petitioning the Congress.

The two petitioning companies here rejected the Compromise Agreement on two grounds: First, they feel the need to litigate the issue of the amount and price of

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[1] 2002 Wholesale Power Rate Adjustment Proceeding, BPA Docket No. WP-02, U.S. Department of Energy, before the Bonneville Power Administration, January 24, 2000, Cross Examination Transcript, 270-71 (hereinafter BPA Tr. 270-71).

power. More fundamentally, they are unwilling to give up the right to "describe publicly" this entire subject. Precisely and exactly, they wish to reserve the right to go to Congress if need be with problems related to these rate and quantity questions.

Fundamentally, Petitioners object to the effort by BPA to deprive them of their right to petition under the Constitution of the United States; even more fundamentally, they object to the tactic of BPA in attempting to deprive the DSIs – an entire subset of the power users of the Northwest – of the right to carry their questions to the public forum. The realistic fact is that the DSIs are collectively a legitimate political bloc. Petitioners recognize that other operators may wish to compromise their quantity/price interest in order to avoid expensive and, indeed, chancy litigation; they believe that the effort of BPA to condition that privilege on the deprivation of the right of petition, not only for themselves, but also for the industry, infects the entire rate-making proceeding.

This case must be seen in the context of political reality. BPA governs the sale of power to its customers, but Congress governs BPA. The administration of the Northwest Power Act is subject to congressional scrutiny, and there have been congressional hearings concerning it. In matters related to BPA, the DSIs have collaborated as a coordinated bloc. *See* Appendix E, Affidavit of Jack Speer. Here the BPA tactic not only requires the companies, which may not be big enough or sturdy enough to stand up to BPA, to agree not to litigate rate-making issues, but also to give up their right of petition as well, thus isolating and indeed marginalizing the two resisting companies. The "compromising" companies must not merely

"support" the BPA approach in the rate case or in court, but also "so indicate in discussions outside the Rate Case venue."

So motivated and so believing, these two Petitioners filed an action to restrain this muffled rate-making process, filing it twice as a protective measure: first, in the District Court for the Western District of Washington; and second, directly in the Ninth Circuit. This duality is because, as is developed in the argument below, there is Ninth Circuit authority that any challenge to BPA must come to it; *see Public Util. Comm'r v. Bonneville Power Admin., supra,* Appendix D. However, it is possible to argue that the proper place, jurisdictionally, to raise Petitioners' challenge to the rate procedure in progress is in the district court. That court dismissed the matter before it for want of jurisdiction. The Court of Appeals dismissed both the original and the appeal proceeding summarily because circuit jurisdiction was exclusive and the circuit court had power to review only "final orders" of the BPA and so could not intrude into the process at this stage. In so doing, it invoked its earlier *Public Utility Comissioner* opinion.

This is a Petition for Certiorari from the two determinations of the Court of Appeals, the one affirming the decision of the district court that it had no jurisdiction, and the other its own order concluding that it also had no jurisdiction. It is the position of Petitioners that one or the other of these courts did have jurisdiction, and that argument is developed in the pages following.

Petitioners ask that this Court stay the close of the rate-making proceedings, so that BPA retains jurisdiction,

and foreclose BPA from entering into new contracts for power in the event this Court determines that proceedings need to be corrected. They contend that BPA is imposing an unconstitutional condition, which because of the agency's superior bargaining power, enables it to atomize the political group which ordinarily could and would speak with one voice. The Executive Branch can no more purchase silence, as BPA has done here, than it could purchase a citizen's vote. Rate and quantity allotments, in this view, should be set without depriving Petitioners, or anyone else, of their political freedom.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION.

BPA sells its power under the authority of the Northwest Power Act. It is the deliberate and express purpose and effort of BPA here to condition the sale of power on stopping "heavy lobbying"; BPA has directly acknowledged that public support "is also needed in Washington"; *see* Affidavit of Jack Speer, Appendix E. BPA is under some review by the Congress at all times. In matters relating to private companies' industrial use of power, the concerns here involved have had a collective interest. They are part of a collective group that has appeared before congressional committees or communicated with congressional committees; *see* Affidavit of Jack Speer.[2]

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[2] For illustration, *see* testimony of John D. Carr, Executive Director, Direct Services Industries, Inc., before the

The practical result of the separate agreements being made here, with their inhibition on public expression of views, is to make it impossible for these companies, as a group, to take up problems they may feel they have with the Congress. By fracturing a group which would otherwise have a common interest, BPA is inhibiting the effective right to petition not only of the companies which are suppressed, but also those which remain.

To elaborate on the nature of the industry and its political collegiality, we draw on the Affidavit of Jack Speer, Appendix E to the Petition, the Northwest Energy Leader for Alcoa. He reports that the DSIs for many years have regular (often weekly) conference calls to formulate united positions to present to their congressional representatives, and to the relevant committees. The DSIs have common lobbyists and lawyers to assist them in Washington. The inhibitions on public speech caused by the Compromise Approach make it impossible for the DSIs to speak "with a strong, united voice as before." By virtue of the Compromise Approach the DSIs can no longer proceed collectively because many of them fear that they will thereby lose their power rates and allocations. Furthermore, Petitioners face a higher rate and smaller allocation of power as a surcharge for exercising even this weakened ability to petition their government.

Subcommittee on Energy, House Committee on Commerce, Dec. 6, 1995. The House Committee on Resources, Subcommittee on Water Power, conducted oversight hearings on June 12, 1997, in behalf of six regional companies, including Vanalco, a Petitioner here.

The leading Supreme Court case and one of the few descriptive of the right of petition is *Eastern R. Pres. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), in which the Court said:

> In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.

The opinion continues to reject any notion that by government action "the people cannot freely inform the government of their wishes." *Id.*

Implicit in the right of petition is the right of associating to petition. *Noerr* upholds the right to associate as well to petition. It asserts the principle that guides us here: "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.* at 138.

Furthermore, the Supreme Court has regularly recognized the augmented effect of assembled speech. In *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S. Ct. 1163, 1170, 2 L. Ed. 2d 1488, 1498 (1958), for instance, the Court stated: "Effective advocacy of both public and private points of view . . . is undeniably enhanced by group association. . . . " And as the Court went on to emphasize, curtailment of this right is subject to heightened scrutiny:

> Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of

> curtailing the freedom to associate is subject to the closest scrutiny.

NAACP, 357 U.S. at 460-61, 2 L. Ed. 2d at 1498-99.

As this Court said in *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294, 102 S. Ct. 434, 70 L. Ed. 2d 492 (1981):

> We begin by recalling that the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. . . . Its value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost.

The government cannot contract away the right of private parties to be heard on public matters, *Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 97 S. Ct. 421, 50 L. Ed. 2d 376 (1976).

The First Amendment guarantees the rights to peaceably assemble and petition the government, and "the[se] rights . . . are among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222, 88 S. Ct. 353, 356, 19 L. Ed. 2d 426, 430 (1967). BPA cannot condition the sale of power on a relinquishment of those rights. But BPA has attempted to do just that.

The Court of Appeals "has decided . . . important federal question[s] in a way that conflicts with relevant decisions of this Court" (Sup. Ct. R. 10(c)), in holding that neither it nor the district court has jurisdiction to now address whether BPA is currently violating the First Amendment.

II. THE COURT BELOW ERRONEOUSLY DECLINED JURISDICTION IN THE FACE OF A SHOWING OF UNCONSTITUTIONAL CONDITIONS.

A. The First Amendment Guarantees a Right of Access to the Courts in this Case.

The Petition Clause of the First Amendment guarantees the right of access to the Courts. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972). *See also Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741, 103 S. Ct. 2161, 76 L. Ed. 2d 277, 288 (1983) (*accord*).

The Court has long recognized the constitutional requirement of a timely judicial determination of First Amendment claims. *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965). In *Freedman*, a Maryland motion picture censorship statute required an exhibitor to submit a film to an administrative board prior to its showing. If the board disapproved the film, the burden of instituting judicial review lay with the exhibitor. The statute put no time limits on either the administrative or the judicial determination. Accepting the argument that under the statute "judicial review may be too little and too late," 380 U.S. at 57, a unanimous Court invalidated the statute. Plainly in the First Amendment context, judicial review delayed may be judicial review denied.

Petitioners claim that they suffer from ongoing First Amendment violations caused by BPA's Compromise Approach. In the summer of 1999, BPA decided to offer the DSIs preferential treatment of allocation and price of power in exchange for an agreement not to criticize key aspects of BPA's positions and procedures concerning the

rate hearing. Most of the DSIs took this bait; Petitioners did not. Petitioners allege that this agency action violates their rights under the Petition Clause of the First Amendment by requiring them to forgo expressing concerns or objections to key aspects of the rate hearing, both in the hearing and elsewhere, or to exercise these rights under the threat of a significant penalty in the form of punitive determinations of allocation and rate for power.

Petitioners also urge, moreover, that the Compromise Approach, in silencing those DSIs who signed on to it, violates Petitioners' rights to assemble with their natural allies, the other DSIs, in pursuing redress before the agency or Congress or otherwise.

Of course, the government can impose conditions on its benefits, but it may not impose an unconstitutional condition, *South Dakota v. Dole*, 483 U.S. 203, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987). Speaking there of congressional grants, but in language apposite here, "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.' *Steward Machine Co. v. Davis*, 301 U.S. at 590," 483 U.S. at 211.

The government cannot exact a promise from a citizen to give up a constitutional right, *e.g.*, to say to someone, "in exchange for [a certain amount of money] you will give up your right to vote." Or, "the government will allow you to deduct business expenses if you promise not to criticize the President." In the course of litigation, the Court's power to impose gag orders is limited by the First Amendment, and no court could impose the gag order that BPA has imposed here. *See Nebraska Press Assoc. v.*

Stuart, 427 U.S. 539, 562, 90 S. Ct. 2791, 49 L. Ed. 2d 683 (1976) (Burger, C.J., for the Court), which held that the lower court's gag order against parties not party to the litigation violated the First Amendment. The record did not support what the Court called "the entry of a prior restraint on publication, one of the most extraordinary remedies known to our jurisprudence." *See also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991), involving a reprimand of a lawyer talking about his case:

> [O]ne central point must dominate the analysis: *this case involves classic political speech*. The State Bar of Nevada reprimanded petitioner for his assertion, supported by a brief sketch of his client's defense, that the State sought the indictment and conviction of an innocent man as a "scapegoat" and had not "been honest enough to indict the people who did it; the police department, crooked cops." [Citation omitted.] At issue here is the constitutionality of a ban on political speech critical of the government and its officials.

(Emphasis added).

The speech in the present case involves the classic right to petition the government for redress of grievances. *See also Nollan v. California Coastal Com.*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987). There the Court held (5 to 4) that it was a "taking" when the California Coastal Commission granted a permit to the Nollans to replace their small beachfront bungalow with a larger house *on the condition that* they allow the public an easement to pass across the Nollans' beach (which was located between two public beaches). Scalia, J., for the Court,

noted that an outright, uncompensated, permanent, public access easement would violate the Takings Clause. Thus, to exact a promise in exchange for the property right was an unconstitutional condition. And *see Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). This case considered the required degree of connection between what the city imposes as a condition of obtaining a building permit, and the projected impact of the proposed development.

This case is controlled by *Board of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996), holding that a government cannot condition public contracts upon the foreswearing of rights to free speech; the opinion clearly rejects, "unconstitutional conditions on speech," 518 U.S. at 679, and the same should apply to the right to petition, the sister right in the First Amendment. *See* for added emphasis the companion case of *O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 116 S. Ct. 2353, 135 L. Ed. 2d 874 (1996). In similar spirit, *see FCC v. League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984), prohibiting a government grant of a privilege on relinquishing a right to speak.

Individuals have a constitutional right to "uninhibitedly and robustly" criticize the government, *Waters v. Churchill*, 511 U.S. 661, 672, 114 S. Ct. 1878, 128 L. Ed. 2d 686, 697 (1994), and corporations, too, have a right to speak out on matters of public policy and cannot be deprived of that privilege, *Consolidated Edison Co. v. Public Service Com.*, 447 U.S. 530, 100 S. Ct. 3326, 65 L. Ed. 2d 319 (1980).

B. There Is Irreparable Harm.

The Ninth Circuit has decided, as a matter of statutory interpretation under the Northwest Power Act, that it can review nothing but "final actions" of the BPA. Petitioners agree, of course, that in the general run of rate cases, a determination of rates is essential before there can be review. This is the finality rule. However, there is an exception: The Court has long recognized the constitutional requirement of a timely judicial determination of First Amendment claims. *Freedman v. Maryland*, 380 U.S. at 51. In this case, as in *Freedman*, judicial review must be timely or it becomes valueless review.

The Compromise Approach is a final agency action in that it does an irreparable injury now by its violations of the First Amendment right to petition. First Amendment guarantees provide freedom from sanctions and the threat of sanctions. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 688 (1964). And "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74, 96 S. Ct. 2673, 2690, 49 L. Ed. 2d 547, 565 (1976) (injunctive relief warranted because plaintiff's First Amendment injuries were "both threatened and occurring at the time"). *See also Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 118, 109 S. Ct. 2829, 106 L. Ed. 2d 93, 100 (1989) (preliminary injunction against enforcement of statute's ban on indecent telephone messages). Petitioners are able to exercise their First Amendment petition rights only under the threat of paying more money for less power. Moreover, and perhaps more importantly, Petitioners' rights of

assembly and association with the other DSIs are violated because the others have relinquished public rights.

III. DEPRIVATION OF FIRST AMENDMENT RIGHT WARRANTS JUDICIAL INTERVENTION AHEAD OF "FINALITY"; IN ANY CASE, THE AGENCY ACTION IS "FINAL."

A. In First Amendment Violation Cases, Finality Is Not Required, either by the Statute or by the Cases.

1. The statute.

The judicial review provision of the Northwest Power Act, 16 U.S.C. § 839(f)(e)(5) provides in its first sentence:

> Suits to challenge the constitutionality of this chapter, *or* any action thereunder, final actions and decisions taken pursuant to this chapter by the Administrator or the Council, *or* the implementation of such final actions . . . shall be filed in the United States court of appeals for the region.

The intention of this directive is explicit. The Ninth Circuit (in this case) has jurisdiction of suits challenging *either* the constitutionality of the chapter, or the constitutionality of an action under the chapter, a final action or decree pursuant to the chapter, *or* the implementation of any final action or decree pursuant to the chapter. Jurisdiction here lies in the circuit court because Petitioners challenge the constitutionality of an act (the Compromise Approach) under the chapter. The constitutionality of an action under the statute does not require finality. Any

decision to the contrary ignores the grammar of the sentence as quoted above.

2. The cases.

In *Leedom v. Kyne*, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958), this Court held that a district court had immediate jurisdiction of a federal question to review an NLRB collective bargaining certification order. This was because the certification had proceeded in flat violation of a statute and the Court determined that effective judicial review would be denied by delay. Here the flat deprivation is of the First Amendment rights of Petitioners and the other DSIs. Petitioners may pursue their rights of assembly and petition only under the threat of an administrative penalty and are deprived of the voice and counsel of the other DSIs whose silence BPA has purchased. This Court has held that it may not assume that there is any casual deprivation of judicial review, and yet that is exactly what we have here; *Board of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 44-45 (1991).

The Court has noted "cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-50, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967). So, for example, a party need not wait for an agency to enforce a regulation to challenge its legality where doing so would put the party in the untenable position of complying with an illegal rule or breaking the law. *Id.* at 150-56. Similarly, an FCC announcement that it

would not provide a business with additional television licenses was sufficiently final, notwithstanding the possibility of additional action, because the announcement operated to "control the business affairs of [the business]." *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 199, 76 S. Ct. 763, 100 L. Ed. 1081 (1956).

Under Petitioners' allegations, Petitioners are suffering ongoing First Amendment injury, which is, *per se*, an irreparable harm. *Elrod v. Burns*, 427 U.S. at 347. Consequently, a timely judicial determination needs to take place now rather than later.

Moreover, there is a sharp economic prejudice in the immediate situation. This means irreparable harm to the economic interest, as well as irreparable harm to the political interest of the companies. Specifically as to Alcoa, BPA's own model predicts that the Compromise Approach creates a 46 percent risk of having to close its aluminum smelters and the attendant loss of jobs throughout the Pacific Northwest. Even if Alcoa escapes this risk, it still will have to purchase electric power in the market under contracts with higher prices and clauses requiring it to pay for that power even if a later court ruling awarded Alcoa more rights to buy power from BPA. Moreover, even if a future court orders BPA to sell more power to Alcoa and Vanalco, BPA will have to obtain that power in the public market, which raises BPA's costs and triggers devices that increase the power rate for many customers – making complete relief impossible later. *See* the Affidavit of Jack Speer.

B. In Any Case, This Agency Action Is Final.

The court below relied on *Public Util. Comm'r*, with its requirement that judicial review of actions under the Northwest Power Act is available only upon final agency action. In this case, there has been final agency action.

The judicial review section of the Northwest Power Act (16 U.S.C. § 839f(e)) gives the Ninth Circuit jurisdiction for direct review of power contracts. Subsection (e)(1)(B) provides that "sales . . . of electric power" under the Act are "final actions subject to judicial review," referencing 16 U.S.C. § 839c(d) which covers "[s]ales to existing direct service industrial customers," *i.e.* the DSIs. BPA inevitably obligated itself in the Compromise Approach to sell specified amounts of power at specified rates to the signatory DSIs, and those DSIs have (up to this point) abided by BPA's muzzling conditions. Hence, this case is the jurisdictional kin of *Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 104 S. Ct. 2472, 81 L. Ed. 2d 301 (1984), which also concerned challenges (though not constitutional challenges) to BPA power contracts with DSIs, *see* 467 U.S. at 388, 81 L. Ed. 2d 309 ("Shortly after the Administrator's decision and the execution of new DSI agreements, respondents challenged the contracts by petition for review in the Court of Appeals."), rather than the opinion of *Public Ut. Comm'n* case cited by the circuit court.

In addition, *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), teaches, as the Court just recently reminded, *Shalala v. Illinois Council of Long Term Care, Inc.*, U.S. No. 98-1109 (Feb. 29, 2000), that potential irreparable injury from delayed review may satisfy a

statutory "final decision" requirement. In *Mathews*, the Court held that the denial of a social security claimant's request for benefits constituted a final agency decision where the claimant "ha[d] raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments." 424 U.S. at 331. The Court applied "the core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered." 424 U.S. at 331, n.11.

In this case, as explained above, Petitioners' claimed First Amendment violations constitute ongoing irreparable harm. *A fortiori*, agency action causing immediate, irreparable harm should be deemed final. This is in keeping with the Court's "pragmatic" approach to the "finality" requirement for judicial review of administrative actions commonplace at least since *Abbott Laboratories v. Gardner*, 387 U.S. at 136. The irreparability of these Petitioners' harm distinguishes this matter from that in *Public Util. Comm'r*, for in that case the court found that the petitioners "failed to demonstrate they face[d] any irreparable injury" and that "delaying review until after FERC confirmation and approval w[ould] not prevent petitioners from obtaining full and effective relief." 767 F.2d at 630. Here Petitioners are prevented by the Compromise Approach from currently exercising their full and unburdened First Amendment rights. These allegations establish the finality required for judicial review at this time.

CONCLUSION

This Court should grant this Petition for Certiorari and direct the Ninth Circuit Court of Appeals either to take jurisdiction of this matter either under its original review jurisdiction over BPA or to remand it for the district court to assume jurisdiction. While we believe that the circuit court had jurisdiction to pass on a serious constitutional question, we assert, at a minimum, that *some* court has power to decide that question now. The effective rights of Petitioners are being lost now, day by day.

Respectfully submitted,

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March 21, 2000

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALCOA INC., Petitioner, v. BONNEVILLE POWER ADMINISTRATION, Respondent.	No. 99-71188
VANALCO, INC., Petitioner, v. BONNEVILLE POWER ADMINISTRATION, Respondent.	No. 99-71189 ORDER (Filed Febr. 9, 2000)

Before: GOODWIN, LEAVY and TASHIMA, Circuit Judges

Respondent's motion to file an oversized memorandum in support of its motion to dismiss this petition for review is granted. Petitioners' motions to file supplemental memoranda regarding jurisdiction are granted. The Clerk shall file Petitioners' supplemental memoranda received on December 3, 1999.

Respondent's motion to dismiss these petitions for review for lack of jurisdiction is granted, *See Public Utility Comm'n v. Bonneville Power Administration*, 767 F.2d 622, 628-29 (9th Cir. 1985).

All pending motions are denied as moot.

PETITIONS DISMISSED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VANALCO INC., a Delaware corporation, Plaintiff, v. BONNEVILLE POWER ADMINISTRATION, Defendant-Appellee, ALCOA, INC., Plaintiff-intervenor-Appellant.	No. 99-36213 DC# CV-99-1618-JCC Washington (Seattle) ORDER
VANALCO INC., a Delaware corporation, Plaintiff-Appellant, v. BONNEVILLE POWER ADMINISTRATION, Defendant-Appellee, ALCOA INC., Plaintiff-intervenor.	No. 00-35009 DC# CV-99-1618-JCC Washington (Seattle) ORDER (Filed Febr. 9, 2000)

Before: GOODWIN, LEAVY and TASHIMA, Circuit Judges

A review of the record indicates that the questions raised in these appeals are so insubstantial as not to need further argument. *See United States v. Hooton*, 693 F.2d 857 (9th Cir. 1982) (per curiam).

Accordingly, appellants' motion for summary disposition is granted. We summarily affirm the district court's judgment.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VANALCO, INC., Plaintiff, ALCOA, INC., Plaintiff-Intervenor, v. ADMINISTRATOR, BONNEVILLE POWER ADMINISTRATION, Defendant.	CASE NO. C99-1618C ORDER (Filed Dec. 7, 1999)

This matter comes before the Court on Defendant Bonneville Power Administration's motion to dismiss. The motion is **GRANTED**. This action is hereby **DISMISSED** with prejudice for lack of subject matter jurisdiction. All pending motions are **DENIED** as moot.

SO ORDERED this 7 day of December, 1999.

/s/ [Illegible]
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX D

PUBLIC UTILITY COMMISSIONER OF OREGON, Pacific Power & Light Company, Portland General Electric Company, and CP National Corporation, Petitioners-Appellants,

v.

BONNEVILLE POWER ADMINISTRATION, and Peter T. Johnson, Administrator, Bonneville Power Administration, Respondents-Appellees,

and

Aluminum Company of America, et al., Intervenors.

Nos. 84-3722, 84-7185.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Sept. 14, 1984.

Decided Aug. 1, 1985.

As Amended Sept. 5, 1985.

Marcus Wood, Guy A. Randles, Pamela J. Jacklin, Stoel, Rives, Boley, Fraser & Wyse, Portland, Or., Paul A. Graham, Asst. Atty. Gen., Salem, Or., Alvin Alexanderson, Portland General Electric Co., Portland, Or., for petitioners-appellants.

Charles H. Turner, U.S. Atty., Jack G. Collins, Thomas C. Lee, David J. Adler, John A. Cameron, Jr., Portland, Or., M. Laurence Popofsky, Peter A. Wald, Dian M.

Grueneich, Heller, Ehrman, White & McAuliffe, San Francisco, Cal., for respondents-appellees.

Appeal from the United States District Court for the District of Oregon.

Before KENNEDY, ALARCON, and FERGUSON, Circuit Judges.

KENNEDY, Circuit Judge:

The principal issue in these consolidated cases is whether, under the judicial review provisions of the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839, *et seq.* (1982) (the Act), jurisdiction of suits which challenge ongoing agency proceedings on constitutional grounds is solely in the district court, concurrently in the district court and the court of appeals, or exclusively in the court of appeals. A secondary issue is whether we should exercise our own jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a) (1982), to review alleged bias in agency proceedings which have not yet concluded. We conclude that section 9(e)(5) of the Act, 16 U.S.C. § 839f(e)(5) (1982), coupled with the All Writs Act, affords this court exclusive jurisdiction to determine the claims made by petitioners, and that we will not exercise our jurisdiction to do so pending final agency action.

Petitioners, the Public Utility Commissioner of Oregon (Oregon PUC), and three investor-owned utilities (IOU's) sued the Bonneville Power Administration (BPA) in the district court, challenging the constitutionality of ongoing agency proceedings. Petitioners alleged proceedings to revise certain rate formulas were initiated by BPA Administrator Peter Johnson with an unalterably closed

mind as to the outcome, and that his participation in the proceedings violated their Fifth Amendment right to due process. The district court dismissed the action for lack of subject matter jurisdiction. *Public Utility Commissioner of Oregon v. Bonneville Power Administration*, 583 F.Supp. 752 (D.Or.1984). Petitioners appealed from the district court dismissal and filed an original action in this court raising claims identical to those raised in the district court. The appeal and the original action have been consolidated for decision in order to resolve the jurisdictional issues.

We affirm the dismissal of the suit in the district court. As to the action commenced in this court, we lack subject matter jurisdiction under the Act as there is no final agency action, and decline to review petitioner's challenge by way of mandamus under the All Writs Act, 28 U.S.C. § 1651(a).

To understand the issues posed by the parties in this case, a brief look at the operation of the Act and the administrative proceedings surrounding this litigation is necessary. One of the goals of the Act is to ensure that residential consumers served by Northwest IOU's have wholesale rate parity with residential consumers served by publicly owned utilities and public cooperatives, BPA's preference customers. Parity is to be achieved through Residential Purchase and Sale Agreements between BPA and IOU's. Under a residential agreement, IOU's exchange their own higher priced power at its "average system cost" (ASC) for an equivalent amount of lower cost BPA power. The agreement involves book-keeping entries only; BPA makes a payment to the IOU for the difference between the IOU's ASC and BPA's preference rate. The Act requires the IOU's to pass the

savings on to their customers. 16 U.S.C. § 839c(c)(3) (1982).

BPA is to recoup its losses resulting from residential agreements, i.e., the price differential between the IOU's ASC and BPA's preference rate, primarily by charging higher rates to its direct service industrial customers (DSI's) until July 1, 1985. After that time, other BPA customers may bear a greater portion of the costs of the exchange. *See* 16 U.S.C. § 839e(c)(1)(B); 16 U.S.C. § 839e(c)(1)(A) (1982). The DSI's have a particularly strong interest in how the IOU's ASC was computed for the contract year July 1, 1984 to June 30, 1985, since the rates they pay for power during that contract year establish a floor for all future rates paid by DSI's. *See* 16 U.S.C. § 839e(c)(2) (1982).

The Act provides that the ASC shall be determined on the basis of a methodology developed by the BPA Administrator in consultation with the Pacific Northwest Electric Power and Conservation Planning Council, BPA's customers, and regional state regulatory bodies. 16 U.S.C. § 839c(c)(7) (1982). Before the ASC methodology is implemented, it must be approved and confirmed by the Federal Energy Regulatory Commission (FERC). *See* 18 C.F.R. § 35.13(a) (1984).

BPA first adopted a methodology for computing the ASC in August 1981. After interim approval and formal administrative proceedings, FERC gave final approval to the methodology in September 1983. At the request of the DSI's, BPA initiated a new ASC consultation in October 1983. The DSI's and BPA believed the then current ASC methodology failed to exclude IOU costs required to be

excluded by the Act, 16 U.S.C. § 839c(c)(7), resulting in DSI rates that were unlawfully high. After providing for considerable public participation, BPA published a proposed ASC methodology. On February 3, 1984, while public consultation sessions were still being conducted, petitioners filed suit in the district court alleging that Johnson's participation in the ASC methodology proceedings denied them due process because Johnson was "absolutely committed" to lowering the ASC calculation, thereby reducing payments to exchanging utilities under the residential agreements. Petitioners sought to have Johnson and his subordinates enjoined from participating in the ASC methodology consultation and asked the district court to delegate decisional authority to an independent hearing officer.

On June 5, 1984, while this litigation was pending, BPA adopted and submitted the revised ASC methodology to FERC with a request for interim approval by July 1, 1984. Although the Commission decided not to grant interim approval, it issued a final order approving and implementing the revised ASC methodology as submitted by BPA on October 1, 1984. These events have rendered moot petitioner's original request for injunctive relief. However, since BPA will undertake to make further revisions to the ASC methodology, this interlocutory challenge to allegedly biased proceedings is capable of repetition, yet evading review. *See Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 348, 46 L.Ed.2d 350 (1975) (per curiam); *California Energy Resources Conservation and Development Commission v. Bonneville Power Administration*, 754 F.2d 1470, 1473 (9th Cir.1985); *NAACP Western Region v. City of Richmond*, 743 F.2d 1346, 1352-53 (9th

Cir.1984); *Planned Parenthood v. Arizona*, 718 F.2d 938, 949-50 (9th Cir.1983). The underlying jurisdictional issue thus remains, and resolution by this court is appropriate.

The district court concluded jurisdiction to consider petitioner's interlocutory challenge to BPA's rulemaking proceedings lies with the court of appeals, not the district court. The court did not squarely hold that the Ninth Circuit had jurisdiction under the Act's jurisdictional provision, but only that the remedy, if any, is in the Ninth Circuit. 583 F.Supp. at 756.

Section 9(e)(5) of the Act, which provides for judicial review, states:

> Suits to challenge the constitutionality of this chapter, or any action thereunder, final actions and decisions taken pursuant to this chapter by the Administrator or the [Northwest Power Planning] Council, or the implementation of such final actions . . . shall be filed in the United States court of appeals for the region. Such suits shall be filed within ninety days of the time of such action or decision is deemed final. . . . Suits challenging any other actions under this chapter shall be filed in the appropriate court.

16 U.S.C. § 839f(e)(5).

In two previous cases, we have held that suits to challenge final actions must, under the Act, be brought in the court of appeals. *Forelaws on Board v. Johnson*, 709 F.2d 1310, 1313 (9th Cir.1983); *Central Lincoln Peoples' Utility District v. Johnson*, 686 F.2d 708, 710 (9th Cir.1982) (*Central Lincoln I*), *rev'd on other grounds sub nom., Aluminum Company of America v. Central Lincoln People's Utility District*,

___ U.S. ___, 104 S.Ct. 2472, 81 L.Ed.2d 301 (1983). However, unlike *Forelaws* and *Central Lincoln I*, where certain power contracts offered by BPA were challenged, this suit involves a constitutional challenge to BPA's proceedings. For this reason, petitioners' first contention is that the Act's jurisdictional section is simply inapplicable to their suit, and that the district court has jurisdiction under 28 U.S.C. § 1331. In essence, petitioners seek to evade the first sentence which requires suits challenging the constitutionality of actions be brought in the court of appeals, by arguing they are not challenging an "action," but rather a proceeding. To support their argument, petitioners point to the savings clause in the last sentence of the provision as evidence that Congress did not intend to vest the court of appeals with exclusive jurisdiction over all suits against BPA.

While it would seem that petitioners seek to draw the scope of the term "action" too narrowly, *see Federal Trade Commission v. Standard Oil Co. of California*, 449 U.S. 232, 238-39 n. 7, 101 S.Ct. 488, 492 n. 7, 66 L.Ed.2d 416 (1980); *Carter/Mondale Presidential Committee, Inc. v. Federal Election Commission*, 711 F.2d 279, 284 n. 8 (D.C.Cir.1983), we need not determine whether the ASC methodology rulemaking proceeding constitutes an "action" within the statutory context. We hold, as did the *District of Columbia Circuit in Telecommunications Research and Action Center ("TRAC") v. FCC*, 750 F.2d 70 (D.C.Cir.1984), and *Air Line Pilots Association, International ("ALPA") v. CAB*, 750 F.2d 81 (D.C.Cir.1984), that where a statute commits review of final agency action to the court of appeals, any suit seeking relief that might affect the court's future jurisdiction is subject to its exclusive review.

The plaintiffs in *TRAC* filed a petition alleging unreasonable delay and seeking a writ of mandamus to compel action by the Federal Communications Commission. The plaintiffs in *ALPA* brought an action against the Civil Aeronautics Board complaining of unreasonably delayed agency action and bias on the part of CAB's Chairman in ongoing administrative proceedings. Addressing the jurisdictional issue raised by those companion cases, the court held that the claims of unreasonable delay and bias were subject to the exclusive review of the court of appeals because the resolution of those claims could affect the court's future jurisdiction over final agency action. *TRAC*, 750 F.2d at 75; *ALPA*, 750 F.2d at 84. The basis of the court's holding was the exclusive jursdiction given to the court of appeals over review of final FCC and CAB action, 28 U.S.C. § 2342(1) (1982), 47 U.S.C. § 402(a) (1982), 49 U.S.C.App. § 1486(a) (1982), in conjunction with the All Writs Act, 28 U.S.C. § 1651(a), which empowers a federal court to issue writs of mandamus necessary to protect its prospective jurisdiction. 750 F.2d at 76; 750 F.2d at 84.

In the case before us, section 9(e)(5) does not expressly state that jurisdiction in the court of appeals is exclusive, as do the statutory provisions governing review of FCC and CAB orders. This distinction, however, does not alter our conclusion that the District of Columbia Circuit cases are on point here. As the disposition of petitioners' claim of bias could affect our future statutory review authority, we have exclusive jurisdiction to consider it. As the *TRAC* court noted, 750 F.2d at 77, jurisdiction over a specific class of claims which Congress

has committed to the court of appeals generally is exclusive, even in the absence of an express statutory command of exclusiveness. *Central Lincoln Peoples Utility District v. Johnson*, 735 F.2d 1101, 1109 (9th Cir.1984) (*Central Lincoln II*); *Assure Competitive Transportation, Inc. v. United States*, 629 F.2d 467, 470-72 (7th Cir.1980), *cert. denied*, 449 U.S. 1124, 101 S.Ct. 941, 67 L.Ed.2d 110 (1981); *Nevada Airlines, Inc. v. Bond*, 622 F.2d 1017, 1020 (9th Cir.1980); *City of Rochester v. Bond*, 603 F.2d 927, 935 (D.C.Cir.1979); *UMC Industries, Inc. v. Seaborg*, 439 F.2d 953, 955 (9th Cir.1971).

The Administrative Procedure Act provides additional support for our conclusion that special statutory schemes of review, such as section 9(e)(5) of the Act, are the sole means of obtaining judicial review for those classes of claims covered by the statute. The APA provides that review must be had pursuant to "the special statutory review proceeding relevant to the subject matter in a court specified by statute," in this case the court of appeals, unless such review is inadequate. 5 U.S.C. § 703 (1982). There is no reason to believe appellate review will be inadequate. *See FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 104 S.Ct. 1936, 1940, 80 L.Ed.2d 480 (1984).

We further reject petitioners' contention that the Administrative Procedure Act provides a separate basis for district court jurisdiction. Petitioners argue that the district court retains jurisdiction to consider the statutory APA claim, even if it lacks jurisdiction over their constitutional claim. Petitioners' only explanation of the so-called statutory claim is that "[t]he APA guarantees plaintiffs a fundamentally fair rulemaking process. 5 U.S.C. § 551 et seq.". This argument, though, is in essence the same as

petitioners' constitutional one, namely, that BPA's administrative proceedings deprive them of due process. Petitioners may not avoid section 9(e)(5)'s mandate of exclusive Ninth Circuit jurisdiction by alleging a separate statutory APA claim. It is now settled that the APA does not provide an independent fount of jurisdiction to review agency action. *Califano v. Sanders*, 430 U.S. 99, 107, 97 S.Ct. 980, 985, 51 L.Ed.2d 192 (1977); *McCartin v. Norton*, 674 F.2d 1317, 1319 (9th Cir.1982); *Glacier Park Foundation v. Watt*, 663 F.2d 882, 885 (9th Cir.1982); *Amusement and Music Operators Ass'n v. Copyright Royalty Tribunal*, 636 F.2d 531, 534 (D.C.Cir.1980), *cert. denied*, 450 U.S. 912, 101 S.Ct. 1352, 67 L.Ed.2d 336 (1981). Jurisdiction must come from a source other than the APA.

Sound policy considerations further support our conclusion that by assigning jurisdiction over constitutional challenges to the court of appeals, section 9(e)(5) preempts district court jurisdiction under the general federal question statute, 28 U.S.C. § 1331. The Supreme Court recently noted the strong preference for reviewing all preliminary or ancillary issues in a proceeding in the forum provided for the final agency order or action. *Florida Power & Light Co. v. Lorion*, ___ U.S. ___, ___, 105 S.Ct. 1598, 1606, 84 L.Ed.2d 643 (1985). Our own precedents are in accord. Jurisdiction by the district court in this instance would create the bifurcated system of review that we criticized in *Forelaws on the Board v. Johnson*, 709 F.2d 1310, 1313 (9th Cir.1983). In *Forelaws* we held that the district court lacked jurisdiction to review a challenge to final BPA action under the National Environmental Policy Act when the court of appeals had original jurisdiction over a challenge to the same final BPA action

under the Act. Bifurcation would have resulted in duplicative effort, confusion, and potential for conflicting results. *Id.* Even though in this case we have the potential for jurisdiction, under the All Writs Act, 28 U.S.C. § 1651(a), the rationale of Forelaws applies with equal force. Petitioners initially filed suit alleging in the district court denial of due process while the ASC methodology consultation was ongoing. When FERC gave final approval to the revised ASC methodology seven months later, we obtained statutory jurisdiction over petitioners' challenge. The likelihood of delay, duplication, and inconsistency resulting from the additional level of possible simultaneous judicial review is exactly what we criticized in Forelaws. *See TARC*, 750 F.2d at 78; *City of Rochester*, 603 F.2d at 936. For all the foregoing reasons, we conclude that our jurisdiction over claims that may affect our future statutory review authority under section 9(e)(5), such as the instant bias claim, is exclusive.

Petitioners' original suit in this court requires us to address the question left open in *Central Lincoln II*, 735 F.2d at 1110, that is, whether the Act grants us jurisdiction to review a constitutional challenge to nonfinal agency action. There is no contention here that BPA or FERC had taken any "final action" concerning the ASC methodology when the present lawsuit was filed. However, the IOU's and DSI's urge us to interpret the Act expansively, so that it permits constitutional challenges even if the question would ultimately arise on review of final agency action. Apparently, they would maintain that every procedural, preliminary, or otherwise nonfinal BPA action is subject to immediate review in the court of appeals so long as the challenge is on constitutional

grounds. By contrast, the BPA urges us to interpret the provision for review of a constitutional challenge to "any action" as permitting review of final BPA actions only.

On its face, section 9(e)(5) makes reference to suits challenging the constitutionality of the Northwest Power Act or any "action" thereunder, suits challenging final actions and decisions taken under the Act by BPA's Administrator or the Northwest Power Planning Council, and suits challenging the implementation of final actions. The jurisdictional provision is clear in providing the court of appeals with original jurisdiction to review only "final" BPA actions when the challenge is on other than constitutional grounds. When the challenge is on constitutional grounds, the statute is ambiguous as to whether the action must be final to warrant original review by this court. Consequently, we interpret the statute according to probable congressional purpose. *See Forelaws on Board, supra*, 709 F.2d at 1312. We conclude that both the text of section 9(e)(5) and the general scheme of the Act, when read in light of the relevant case law, reveals Congress' intent to limit judicial review of constitutional challenges to final agency action.

Although the provision for review of a constitutional challenge to "any action thereunder" in the first clause of section 9(e)(5) seemingly confers broad jurisdiction on the courts of appeals, this phrase takes on a narrower meaning when viewed in the context of section 9(e) in its entirety. First, the second sentence of section 9(e)(5), which states "*[s]uch suits* shall be filed within ninety days of the time such action or decision is *deemed final* . . . " (emphasis added) creates a ninety-day statute of limitations for suits specified in the first sentence. By beginning

with the words "such suits," the statute of limitations provision necessarily refers back to all suits; the finality requirement of this provision, in our view, refers back to all suits as well. We conclude that Congress did not intend to split this provision, applying the finality requirement to some actions and not to others, depending on the substantive infirmity alleged. Were the finality requirement not to apply to constitutional challenges such as the instant one, it is unclear when the ninety-day statute of limitations would commence. Without clear direction from Congress, we refuse to construe section 9(e)(5) in a manner that would create such confusion and uncertainty. *See Forelaws on Board v. Johnson*, 743 F.2d 677, 680 (9th Cir.1985); *cf. Lorion*, ___ U.S. at ___, 105 S.Ct. at 1606.

The scheme of the Act provides additional support for our conclusion that finality is required. Congress created a specific administrative process for development of the ASC methodology, ensuring that administrative review precedes judicial review. The process involves development of a proposed methodology by the BPA Administrator in consultation with the Pacific Northwest Electric Power and Conservation Planning Council, BPA's customers, and regional state regulatory bodies, and then confirmation and approval by FERC. 16 U.S.C. § 839c(c)(7). Once these steps are taken, a final action subject to judicial review has occurred.

The absence of an express finality prerequisite in statutes providing for appellate review of administrative actions, such as the Act, does not prevent the implication of such a requirement. Courts commonly attribute a finality requirement to statutes that simply provide for review

of administrative orders and actions in order to avoid the disruption, delay, and piecemeal review that accompany interference with pending administrative proceedings. *Bell v. New Jersey*, 461 U.S. 773, 103 S.Ct. 2187, 2190-91, 76 L.Ed.2d 313 (1983); *Papago Tribal Utility Authority v. F.E.R.C.*, 628 F.2d 235, 238 (D.C.Cir.), *cert. denied*, 449 U.S. 1061, 101 S.Ct. 784, 66 L.Ed.2d 604 (1980); *Rosenthal & Co. v. Commodity Futures Trading Commission*, 614 F.2d 1121, 1125 (7th Cir.1980); 16 C. Wright, A. Miller, E. Cooper, & E. Gressman, Federal Practice and Procedure § 3942 at 310-11 (1977); *see FPC v. Metropolitan Edison Co.*, 304 U.S. 375, 383-85, 58 S.Ct. 963, 966-67, 82 L.Ed. 1408 (1938).

Petitioners' argument that finality should not be required where the challenge is on constitutional grounds because the statutory review procedure in such cases is inadequate is unpersuasive. Although FERC will not review the conduct of the BPA's Administrator, 49 Fed.Reg. 39,293 (1984), it does, of course, review the ASC methodology itself. If FERC fails to correct any defects in the methodology, redress is available in the court of appeals on that ground. Further, petitioners may challenge the action adopting the methodology on the ground that it is defective for reasons of disqualification of the BPA Administrator. *See Association of National Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1178 (D.C.Cir.1979) (Leventhal, J., concurring), *cert. denied*, 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed.2d 1113 (1980); *Central Lincoln II*, 735 F.2d at 1116-20.

If, upon review of the final action approving and implementing the ASC methodology, and in the context of a constitutional challenge to the validity of the agency proceeding as a whole, the agency record is insufficient, we can remand the record to the agency for further

development, appoint a special master under 28 U.S.C. § 2347(b)(3), or accommodate any additional discovery needs. *ITT World Communications*, 104 S.Ct. at 1940; *Public Power Council v. Johnson*, 674 F.2d 791, 793-94 (9th Cir.1982); *Pacific Power & Light Co. v. Bonneville Power Administration*, 589 F.Supp. 539, 547 n. 7 (D.Or.1984), *appeal pending*, No. 84-4072. At that time, the issue of bias along with any other cognizable challenges will be fully reviewable and the entire ASC methodology subject to vacation if necessary. *See Association of National Advertisers*, 627 F.2d at 1178 (Leventhal, J., concurring); *San Luis Obispo Mothers for Peace v. Hendrie*, 502 F.Supp. 408, 411 (D.D.C.1981); 5 U.S.C. § 704 ("A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.").

Our decision is entirely consistent with the general presumption in favor of postponing review until the conclusion of agency proceedings. This presumption is based on the general doctrine of ripeness, *Friends of Hop Marketing Order v. Block*, 753 F.2d 777, 778 (9th Cir.1985) (per curiam), and the doctrine of exhaustion. *McKart v. United States*, 395 U.S. 185, 193-95, 89 S.Ct. 1657, 1662-63, 23 L.Ed.2d 194 (1969). Refusing intervention in current agency proceedings ensures against premature, possibly unnecessary, and piecemeal judicial review. Thus, postponing review until final agency action is the most efficient means of review, avoiding disruption of the administrative process and delay of the ultimate resolution of agency proceedings. *FTC v. Standard Oil Co.*, 449 U.S. 232, 242, 101 S.Ct. 488, 494, 66 L.Ed.2d 416 (1980); *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136, 148-49, 87

S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967); *Rosenthal & Co.*, 614 F.2d at 1126.

Our conclusion that action taken by an agency, even though it implicates constitutional issues, must be final agency action before it is reviewable in the court of appeals does not end our inquiry, for we must determine whether special circumstances in the case warrant exception. Though there is a possibility that in an extreme case an action is challengeable by suit on constitutional grounds before it is final, these cases no doubt would be reviewable by extraordinary writ with jurisdiction predicated on the All Writs Act, 28 U.S.C. § 1651. The jurisdictional basis for interlocutory review of any nonfinal BPA action is our inherent power of mandamus to preserve prospective jurisdiction. As a consequence, such jurisdiction would not lie in the district court, but in the court of appeals, the court with ultimate authority to review final agency action. *TRAC*, 750 F.2d at 77; *Association of National Advertisers*, 627 F.2d at 1179 (Leventhal, J., concurring). *Accord San Luis Obispo Mothers for Peace*, 502 F.Supp. at 411-12; *see FTC v. Dean Foods Co.*, 384 U.S. 597, 603-04, 86 S.Ct. 1738, 1742, 16 L.Ed.2d 802 (1966).

The preemptory writ of mandamus has traditionally been used in federal courts to review nonfinal district court orders and is used only in exceptional circumstances. *Kerr v. United States District Court*, 426 U.S. 394, 402, 96 S.Ct. 2119, 2123, 48 L.Ed.2d 725 (1976); *Clorox Corp. v. United States District Court*, 756 F.2d 699, 700 (9th Cir.1985); *United States v. Harper*, 729 F.2d 1216, 1221 (9th Cir.1984). Use of the All Writs Act in connection with agency matters has been even more rare and the scope of relief granted in these cases has been narrow. *See Arrow*

Transportation Co. v. Southern Railway Co., 372 U.S. 658, 671 n. 22, 83 S.Ct. 984, 991 n. 22, 10 L.Ed.2d 52 (1963); *Silverman v. National Labor Relations Board*, 543 F.2d 428, 430 (2d Cir.1976) (per curiam). The circumstances that will justify our interference with nonfinal agency action must be truly extraordinary, for this court's supervisory province as to agencies is not as direct as our supervisory authority over trial courts. *Association of National Advertisers*, 627 F.2d at 1179 (Levanthal, J., concurring). *See Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*, 435 U.S. 519, 555-58, 98 S.Ct. 1197, 1217-19, 55 L.Ed.2d 460 (1978); *Public Power Council*, 674 F.2d at 795 (1982).

As petitioners have failed to demonstrate they face any irreparable injury that is not correctable on review of final BPA action, we decline to exercise jurisdiction under the All Writs Act over their interlocutory claim of bias. *See Wisconsin Gas Co. v. Federal Energy Regulatory Commission*, 758 F.2d 669, 674-75 (D.C.Cir.1985) (per curiam); *In re Cement Antitrust Litigation*, 688 F.2d 1297, 1301 (9th Cir.1982), *aff'd for absence of quorum*, 459 U.S. 1191, 103 S.Ct. 1173, 75 L.Ed.2d 425 (1983); *accord ALPA*, 750 F.2d at 88 (declining to exercise its jurisdiction under the All Writs Act over the interlocutory claim of bias on the part of the CAB). Petitioners assert that the delay in reaching appellate review of the bias claim will cause them irreparable harm because they have no administrative remedy in the interim. FERC has stated that it will not examine the fairness of BPA's proceedings to revise the ASC methodology. *See* 49 Fed.Reg. 39, 293 (1984). Nevertheless, delaying review until after FERC confirmation and approval will not prevent petitioners from obtaining full

and effective relief. If petitioners prevail, the entire ASC methodology proceeding is subject to vacation if necessary, and the court can order refunds for any over-collections by BPA during the period the new methodology was in effect. *Cf. Cities of Anaheim v. FERC*, 723 F.2d 656, 662 (9th Cir.1984). This court may also make a retroactive adjustment of rates for the purpose of determining the statutory baseline. *See* 16 U.S.C. §§ 839e(c)(1)(A) and 839e(c)(2). By contrast, if we had suspended proceedings or wrongly forced the Administrator to recuse, the entire 1985 rate process would have been disturbed and the DSI's subject to the possibility of judicially-mandated refunds to the IOU's. Petitioners lose nothing by having to await FERC confirmation and approval before pursuing their claim in this court.

The judgment of the district court is AFFIRMED. The action for declaratory and injunctive relief and the petition for mandate filed in this court are DISMISSED.

APPENDIX E

STATE OF Washington)
) ss.
County of Chelan)

AFFIDAVIT OF JACK SPEER

Jack Speer, having been first duly sworn, deposes and says:

1. I am Northwest Energy Leader for Alcoa Inc. ("ALCOA"). I received a bachelor of science degree from the University of Washington in 1967. I have worked on Pacific Northwest power issues since 1970, for the Snohomish County, Washington PUD, then Anaconda Aluminum Co., and then ALCOA.

2. For many years, including the present time, DSIs have had regular (often weekly) conference calls and meetings to discuss and formulate united positions on issues to present to BPA and to their congressional representatives. This has then resulted in unified communications on these issues not only to BPA and the "Northwest delegation" (i.e., U.S. senators and members of the U.S. House of Representatives representing states in the Pacific Northwest), but also to leaders of the relevant Senate and House committees or subcommittees in Washington, D.C. I have made such presentations in the Northwest and in Washington, D.C. I personally testified on behalf of the DSIs on legislation that ultimately became the Northwest Power Act. Other issues on which the DSIs previously have presented a united front before their elected congressional representatives include: fish and wildlife "mitigation" measures, federal power marketing

agency issues, the 1992 Energy Policy Act, and the Clinton – Gore British Thermal Unit ("BTU") tax proposal. Attached Exhibit A is a copy of the testimony of DSI Executive Director John D. Carr before the Subcommittee on Energy and Power of the House Commerce Committee on December 6, 1995 pertaining to proposed deregulation of energy markets. Attached Exhibit B is a copy of the June 12, 1997 agenda of the Subcommittee on Water and Power of the House Committee on Resources, and the testimony of DSI Executive Director Steve Waddington's of that same date before that subcommittee on several policy and process issues related to restructuring BPA and deregulating sales and transmission of power. Attached Exhibit C is a copy of DSI Executive Director Steve Waddington's October 20, 1997 memorandum to the legislative assistant to U.S. Senator Slade Gorton on the DSI positions on numerous issues involved in potential legislative restructuring of BPA to deregulate energy sales and transmission.

3. Furthermore, the DSIs have united to retain lobbyists and lawyers in Washington, D.C., to assist in these efforts.

4. The Compromise Approach has fractured this unity. Although there still are some issues on which all DSIs have the freedom to agree, on major issues it has been impossible to speak with a strong, united voice as before. For example, ALCOA would like Congress to urge BPA to abandon its attempt to pass benefits to residential consumers through a sale of power to investor-owned utilities, and instead provide those benefits through an exchange of power as provided in the Northwest Power Act. The Compromise DSIs have been unwilling to

espouse their support for such efforts, because they are bound to support the Compromise Approach. As a result, there has been no united DSI effort in that regard. In 1999, the DSIs, Investor-Owned Utilities, and (some) public utilities were exploring together legislation to regionalize and restructure BPA. ALCOA and Vanalco wanted to promote legislation that would take effect immediately, before and instead of the current rate case and accompanying BPA plan to enter into the "subscription" contracts. BPA did not want any legislation that would affect the ongoing rate case or contracts it anticipated under the "subscription" process. The DSIs that succumbed to the Compromise Approach sided with BPA, presumably because otherwise they would not be in "support" of the Compromise Approach.

5. Through official discovery and cross-examination in the rate case, it was shown that the Compromise Approach precludes the DSIs who agreed to it ("the Compromise DSIs") from freely expressing their views to Congress. Attached Exhibit D is a copy of a document obtained in the official discovery, prepared by Harry Clark, a BPA official, with responsibility for the Compromise Approach. It refers to BPA's goal "to stop heavy lobbying in Washington, D.C." At the rate case cross-examination, Clark admitted as follows:

> Q. Do you have a recollection of what the reference in the paragraph above it to stop heavy lobbying in DC referred to?
>
> A. (Mr. Clark) I thing that refers to that we needed support for the compromise approach for going forward with it, and that support needed to be here in the Northwest, and that

support also needed to be in Washington. BPA Tr. 266.

Also during rate case cross-examination, BPA witness Syd Berwager, directly involved in creating the Compromise Approach, was asked to explain the circumstances of two letters, an August 31, 1999 letter from counsel representing the Compromise DSIs as well as ALCOA to U.S. Congressman Brian Baird (Ex. WP-02-E-AL-04), attached hereto as Exhibit E, and a September 28, 1999 letter from the Compromise DSIs to BPA official Paul Norman (Ex. WP-02-E-AL-07), attached hereto as Exhibit F. Mr. Berwager explained, in essence, that BPA believed the letter to Congressman Baird violated the Compromise Approach ("was pretty deficient") because it was a "missed opportunity" to support the Compromise Approach before Congress. This was discussed on the rate case cross-examination transcript at page 268, line 3, to page 270, line 20. Attached Exhibit F was, as its contents reveal, an effort by the Compromise DSIs to apologize to BPA for the letter to Congressman Baird by assuring BPA that they will continue to comply with the Compromise Approach.

In the rate case, BPA counsel summarized BPA testimony on the Compromise Approach as follows:

> MR. WRIGHT: It seems to me that the witnesses have testified that, yes, indeed, there was a compromise agreement. Yes, indeed, it did require the signers to do certain things, among those things that they were required to do was to show support, to refrain from certain actions and that those actions included actions both locally and in Washington, D.C. BPA Tr. 270-71.

Attached Exhibit G contains the portions of the BPA transcripts referred to above.

6. When ALCOA or Vanalco assert a position regarding BPA without full DSI support, it is easy for that position to be taken lightly or disregarded as a minority viewpoint. ALCOA has less impact because it is not united with other DSIs.

7. Over the years, there have been court challenges to BPA conduct. Sometimes the DSIs oppose BPA and sometimes they align with BPA. *See, e.g., Aluminum Co. v. Central Lincoln Util. Dist.*, 467 U.S. 380, 104 S. Ct. 2472, 81 L. Ed. 2d. 301 (1984) (aligned with BPA), and *Washington Utilities and Transp. Com'n (WUTC) v. F.E.R.C.*, 26 F.3d 935 (9th Cir. 1993), (opposing BPA). Not until the Compromise Approach, however, were the DSIs fractured in their court positions. Under the terms of the Compromise Approach itself, the Compromise DSIs became obligated to delay a Ninth Circuit challenge to an illegal BPA process (the "Subscription Record of Decision") whereby it decided key rate issues outside the process required by Northwest Power Act § 7(i). That case is *Goldendale Aluminum Company et al v. Bonneville Power Administration*, United States Court of Appeals for the Ninth Circuit, Case Nos. 99-70268, 99-70320, 99-70319, 99-70323, and 99-70318.

8. In the ongoing rate case, if the DSIs who succumbed to the Compromise Approach had the freedom to express their positions, then based upon their traditional positions, and what I know as someone intricately involved in power management for aluminum smelters. I believe those DSIs would be joining with ALCOA and

Vanalco, Inc. ("Vanalco") on many issues that they have been silent about in their rate case testimony. Those issues include, but are not limited to:

a. Whether the Subscription ROD is illegal, for failure to comply with procedures of the Northwest Power Act.

b. Whether decisions made in the Subscription ROD should be permissible subjects of testimony in the rate case.

c. Whether matters decided in the Subscription ROD properly should be decided in the rate case.

d. Whether costs of fish and wildlife protection should be determined in the rate case, instead of beforehand based on a directive of United States Vice President Gore.

e. Whether BPA should offer power to the DSIs at its traditional cost-based industrial power rate.

f. What BPA should do with additional funds made available by decreasing its revenue requirements.

g. Whether the BPA residential exchange settlement is illegal.

9. According to Syd Berwager at BPA, ALCOA will receive 220.8 MW of power under the Compromise Approach. If all of this power were used to serve ALCOA's qualifying aluminum smelter load in the Northwest, leaving no BPA power for ALCOA's magnesium plant, this represents about 35 percent of ALCOA's Northwest aluminum smelter load qualifying for direct service from BPA. Based upon BPA testimony, at a 68¢/lb.

aluminum market there is a 68 percent closure risk if all of the load is served at market prices of 28 mills and a 36 percent closure risk if half of the load is served at 25 mills and the remainder at market prices. Using linear extrapolation, if 35 percent of the load is served at 25 mills, and the remainder at market, the closure risk faced at ALCOA aluminum smelters would be approximately 46 percent because of the Compromise Approach. Even if this risk is avoided, the high cost of power resulting from the Compromise Approach will make ALCOA's Northwest facilities less competitive and decrease the likelihood of these facilities operating at high employment levels.

10. The demand for subscription sales is expected to exceed the supply of BPA cost-based power. Delayed judicial review that eventually results only in a remedy of reducing BPA's rates to ALCOA will be inadequate. ALCOA will need to enter into power contracts with suppliers other than BPA in the interim, and will probably be unable to undo those contracts, even if an eventual decision by this Court results in a ruling that BPA should have made larger allocations of power to ALCOA and at lower rates. Even if BPA eventually is ordered to give ALCOA a larger power allocation, it will only be able to do so by purchasing market-based power, because it already will have sold all of its cost-based power. This may trigger clauses in BPA power contracts, increasing rates for all DSIs (including petitioners), and many other customers.

11. BPA's funding would not be jeopardized by an injunction against proceedings in the power rate case. Nor would an injunction reduce demand or limit BPA's

ability to sell its power. This is discussed more fully below.

12. BPA has available an approved rate for hydroelectric power referred to as the FPS-96 rate, until 2006. This rate is driven by market prices; as a result, it would give BPA more revenues than the rates it has proposed in the current rate-making case.

13. The BPA 1999 annual report to the President of the United States ("Annual Report") demonstrates that because BPA enjoys the largest cash surplus in its history, it will have the ability to make its desired payments to the United States Treasury. For example, in 1999, BPA enjoyed its highest net revenues in eight years, $123,286,000. Year-end reserves were $670,000,000, an increase of $111,000,000 over 1998; moreover, the 1998 year-end reserves were $120,000,000 higher than the year-end reserves for 1997. In 1999, BPA increased its cash balance from $582,879,000, to $685,014,000, an increase in excess of $102,000,000. This continued the trend from the previous two years in the existing rate period, when the year-end cash balance increased by over $136,000,000 (from 1998) and by over $199,000,000 (from 1997).

14. In the Audited Financial Statements that are a part of the Annual Report, prepared by BPA and audited by the nationally recognized auditing firm of Price Waterhouse Coopers, several statements confirm that BPA has been able to repay its Treasury debt ahead of schedule because of the existing rates now in place:

- "BPA's rates are sufficient to recover all FCRPS investment costs on or before their due dates";

- "In each year, BPA's repayment schedule is ahead of the term schedule";
- "FCRPS investment expected through fiscal year 1999 is scheduled to be returned to the U.S. Treasury * * * ahead of due dates."

Annual Report at 30.

15. In any event, the U.S. Treasury does not actually declare default. Rather, BPA announces a deferral if it does not make the level of its desired payments to the Treasury. As in the 1970s and early 1980s when BPA experienced this situation, the unpaid interest merely is added on to the outstanding principal.

16. Attached Exhibit H is a copy of the "Compromise Approach," consisting of a June 18, 1999 letter from BPA to Goldendale Aluminum Company, one of the DSIs who agreed to the Compromise Approach, and a June 17, 1999 document prepared by BPA. All DSIs who agreed to the Compromise Approach received and signed off on letters the same as the June 18, 1999 letter, although some of them added certain caveats. There are 11 active DSIs. Eight are aluminum producers. Of these eight, only ALCOA and Vanalco did not submit to the burdens of the Compromise Approach.

/s/ Jack Speer
Jack Speer

SWORN AND SUBSCRIBED to before me this 15th day of March, 2000, by Jack Speer.

/s/ Virginia A. Davis
Notary Public

My commission expires: Nov. 30, 2001

EXHIBIT A

Direct Service Industries, Inc.

[Address Omitted In Printing]

Testimony by
John D. Carr, Executive Director,
Direct Services Industries, Inc.
before the
Subcommittee on Energy and Power,
House Committee on Commerce
December 6, 1995

INTRODUCTION

I appreciate the opportunity to address the Subcommittee on behalf of Direct Service Industries, Inc. The issues surrounding the increasingly competitive regional energy market are of vital importance to everyone in the Pacific Northwest. Chairman Schaefer and Subcommittee members, you are to be commended for focusing attention on the role of the Bonneville Power Administration in competitive electricity markets in the Northwest and on the west coast. I believe your leadership can bring us closer to a regional solution that will benefit all electricity consumers.

Direct Service Industries, Inc. represents ten major companies in Washington, Oregon and Montana. These companies produce aluminum, magnesium and chemicals. Together, they account for more than 43 percent of the nation's aluminum production. They employ roughly 10,000 people, and contribute $2.3 billion every year to the Northwest economy through wages, taxes and purchases.

Historically, the direct service industries have purchased most of their power from the Bonneville Power Administration, and have represented about one-third of BPA sales. However, as the regional energy market rapidly evolves toward a more competitive market, alternative suppliers – including private utilities and independent power marketers – are becoming very competitive. In response to changes in the market, most DSIs have shifted portions of their load to other suppliers – as have other BPA customers. BPA has responded competitively, having recently secured new power contracts with most of these industries and long term transmission contracts with all of the DSIs. This change in our historical relationship with BPA is just one of many changes the region will experience as we move to a deregulated, fully competitive wholesale energy market.

THE BENEFITS OF COMPETITION

The DSIs favor a deregulated, competitive wholesale energy market because we understand that competition works. Competition benefits everyone. The DSIs work and live in global competitive markets. On a daily basis, we see how competition provides more options, improved services and lower prices.

Other industries provide good examples. It is now possible to buy an airline ticket from Portland, Oregon, to San Francisco for $50, for example, because the airline industry is deregulated and more competitive. Similarly, companies like AT&T didn't begin advertising "True Savings" until deregulation allowed companies like MCI and Sprint to complete.

Electric consumers will enjoy the same type of benefits in a competitive energy market. In a highly regulated system, where utilities have captive customers and a guaranteed return on investment, there is little incentive for utilities to keep costs low. In a deregulated, competitive market – where customer retention depends on service and price – there is great incentive for utilities to control costs. And when utilities control costs, all consumers benefit through lower rates.

BPA's RESPONSE TO COMPETITION AND DEREGULATION

Historical Background

When Congress created the Bonneville Power Administration in 1937, it granted Bonneville very broad authority to dispose of federal power and transmission services to utilities and direct service industries under terms the BPA Administrator deemed appropriate. Bonneville has served its industrial DSI customers ever since they located in the Pacific Northwest to help utilize the federal hydropower that was otherwise surplus to the region's needs. Historically, the DSIs have not been customers of local utilities, and Bonneville's sales to the DSIs have never been subject to non-federal regulation.

Bonneville has always maintained an open access transmission system for its utility customers and, since 1964, Bonneville has been required by federal law to provide transmission access on a "fair and non-discriminatory basis." In addition, for at least three decades, Bonneville has provided transmission services to the DSIs when such service was needed to bring electric power to

the DSIs' facilities at times BPA was unable to meet the DSIs full power needs.

The Move Towards Competition in the Northwest.

The National Energy Policy Act of 1992 granted the Federal Energy Regulatory Commission the authority to require all transmission providers to provide non-discriminatory transmission access to wholesale power suppliers. Congress clearly wanted to facilitate development of a truly competitive bulk power market. Plainly, Bonneville's pre-existing authority to provide transmission services to the DSIs was maintained.

Since EPA-92, Bonneville and its customers have worked cooperatively on principles to govern how a competitive power market and open access transmission system could be implemented to meet the needs of the Pacific Northwest, given the unique history of the Northwest power system. There is a broad consensus that Bonneville should offer transmission services to all its customers at prices comparable to the service and prices they would receive as part of a bundled power sale from BPA.

Bonneville should be commended for moving quickly to implement competitive markets and open access transmission. Bonneville has entered into long term transmission agreements with the DSIs which grant them transmission rights equivalent to the transmission rights of Bonneville's utility customers. These agreements differ from the utility contracts only by retaining Bonneville's traditional rights to interrupt power deliveries to the

DSIs as necessary to protect power deliveries to other customers in the Northwest.

Bonneville has also negotiated new power sales contracts with the DSIs where, subject to specific contract commitments, customers are free to purchase power from any available source. Finally, Bonneville has proposed transmission terms and conditions that, when adopted, will apply to Bonneville the full range of requirements that FERC is imposing on the public utilities that FERC regulates.

The False Argument of "Stranded Costs"

Power markets have become fiercely competitive in the Pacific Northwest. Competitive forces are in conflict with Bonneville's ability to continue to support cross-subsidies and to pay escalating costs of fish mitigation measures. The beneficiaries of the subsidies and uncontrolled spending have invoked the unrelated issue of "stranded cost" to prevent customer choice and the development of truly competitive markets in the Northwest.

It is my belief that the concept of "stranded costs," as used by FERC, in its notice of proposed Rulemaking, does not apply to Bonneville. FERC is concerned that the change from a closed transmission system to an open transmission system will prevent public utilities from recovering the capital cost they incurred in order to meet their obligation to serve customers. Bonneville has always had an open transmission system; most of its capital investments were made when Bonneville had no

obligation to serve; and Bonneville has never had a reasonable expectation that it would meet the full power needs of its customers. Moreover, Bonneville can meet its current costs, it merely cannot meet every new demand placed on it. In short, Bonneville is not faced with stranded costs.

In an effort to provide some legitimacy to the "stranded cost" argument, some parties have pointed to Bonneville's large WPPSS nuclear plant investment. Bonneville had no problem meeting its WPPSS obligations until the recent escalation of competing demands for Bonneville funds. It is clear that Bonneville would be better off without WPPSS debt, but the existence of this debt is no excuse to cut off competition so that Bonneville's other costs can grow unchecked by market forces.

It would be a great mistake to allow arguments couched in terms of "stranded costs" to derail BPA's move to competitive power markets in order to preserve the subsidies and inefficiencies which uncompetitive markets of the past have fostered.

VISION FOR THE FUTURE

Bonneville Power Administration has done well to anticipate and embrace the changes in the energy market place. Deregulation of the energy market will continue to bring additional changes – and not just to BPA – but to every citizen in the region. The four Northwest Governors have recently organized a comprehensive review of the effects of increased competition and deregulation in regional energy affairs. The DSIs will participate in this

review, and will be promoting our vision for a future energy market that consists of the following four basic elements:

1. The new competitive energy market must include open access to the region's transmission system at affordable rates. The high-voltage integrated transmission system in the Northwest is among the largest and most sophisticated in the world. This transmission network is a public infrastructure, like a highway.

2. In a deregulated system with open transmission access, all wholesale customers will have access to multiple energy suppliers. The essence of competition, obviously, is the ability to choose among suppliers.

3. This opportunity to choose among competing suppliers will lead naturally to the elimination of cross-subsidies. A fair and competitive market will simply not allow rates that are artificially increased by subsidies to continue. Price will drive customers to suppliers without subsidies. Arguments over stranded investment must not be used as a smoke screen for preserving cross-subsidies.

4. In the Pacific Northwest, a deregulated energy market must include an affordable and accountable salmon recovery program.

These four elements – open access to transmission, choice of supplier, elimination of subsidies, and an accountable salmon program – will lead to lower electricity rates for all consumers in the Pacific Northwest.

CONCLUSION

We are happy to have this opportunity to participate in the regional effort to create this new energy market. The DSIs will be a positive and active player in these discussions. We stand ready to work with other regional interests. This Subcommittee is an important and useful forum for focusing these discussions, and we appreciate the opportunity you have provided to address these important issues.

DIRECT SERVICE INDUSTRIES, INC. MEMBERS

Alumax Inc. (Ferndale, WA)

Aluminum Company of America (Addy, WA & Wenatchee, WA)

Columbia Aluminum Corporation (Goldendale, WA)

Columbia Falls Aluminum Company (Columbia Falls, MT)

Elf-Atochem North American, Inc. (Portland, OR)

Georgia-Pacific Corporation (Bellingham, WA)

Kaiser Aluminum & Chemical Corporation (Spokane, WA; Tacoma, WA; & Mead, WA)

Northwest Aluminum Company (The Dalles, OR)

Reynolds Metals Company (Longview, WA & Troutdale, OR)

Vanalco, Inc. (Vancouver, WA)

EXHIBIT B

U.S. House of Representatives
Committee on Resources
Washington, DC 20515
SUBCOMMITTEE ON WATER AND POWER

Thursday, June 12, 1997
2:00 P.M.
1324 Longworth H.O.B.

AGENDA

Oversight Hearing on:

The Status of the Regional Review Process for the Bonneville Power Administration.

WITNESSES

Panel I

Mr. Roy Hemingway
Energy and Salmon Policy Advisor
Office of the Governor of Oregon

Mr. Randall W. Hardy
Chief Executive Officer and Administrator
Bonneville Power Administration

Mr. William A. Pascoe
Vice President, Transmission Services
Montana Power Company

Mr. Steve Waddington
Executive Director
Direct Service Industries, Inc.

Panel II

Ms. Nancy Hirsh
Policy Director
Northwest Conservation Act Coalition

Ms. C. Clark Leone
Manager
Public Power Council

Mr. Wendell Hannigan
Member, Fish and Wildlife & Law and Order Committee
Confederated Tribes and Bands of the Yakama Indian Nation

Direct Service Industries, Inc.
[Address Omitted In Printing]

Testimony of Steve Waddington
Executive Director, Direct Service Industries, Inc.

Before the
U.S. House Subcommittee on Water and Power Resources

June 12, 1997

Mr. Chairman and members of the subcommittee, thank you for inviting me to testify before you on the important matter of the future role of the Bonneville Power Administration (BPA). My name is Steve Waddington. I am the executive director of Direct Service Industries, Inc. (DSIs), a trade association of industrial customers that purchase electric power directly from the BPA, as well as from other bulk power suppliers in the

competitive marketplace in the Pacific Northwest. Members of DSI, Inc. are six aluminum companies in Washington and Oregon, specifically: Alumax, Inc., Goldendale Aluminum Company, Kaiser Aluminum & Chemical Corporation, Northwest Aluminum Company, Reynolds Metals Company, and Vanalco, Inc.

Although one aluminum company was represented on the Steering Committee of the Comprehensive Regional Review of the Northwest Energy System, the DSIs were not represented as a group. The DSIs followed the year-long deliberations of the Steering Committee closely, and we are now participating in the current efforts in multiple forums to implement the recommendations of the Regional Review contained in its Final Report.

The Regional Review Concluded with a fragile consensus regarding broad policy guidance on a number of issues related to the structure of the electricity markets and BPA's role in these markets. Its statement of broad policy is not subject to multiple interpretations and requires additional work toward real consensus.

The DSIs support the broad goals outlined in the Final Report taken as a whole. Some interests in the Northwest cite sections of the Final Report as if it were a precise blueprint – etched in stone – for the future of BPA and energy markets in the Pacific Northwest. We do not view the report in this light. The Regional Review Final Report provides broad policy guidance that point us in a direction, but the report is not comprehensive and it is not a blueprint for specific implementation.

The Steering Committee recognized the need for substantial work toward implementation, as evident in their recommendation to establish the Transition Board to oversee these implementation efforts and act as liaison with Congress on any legislative recommendations that could ensue.

There are many details and complicated issues that need to be addressed before implementation. Resolving these implementation details will likely stress the already fragile consensus on the Broad recommendations. The potential for implementation having unintended consequences is high because the issues are complex and interrelated. No one will know until these details have been addressed what the impact will be on individual interests and the cumulative impact on the Northwest economy. Our effort, and we hope your effort, is to do everything possible to achieve a successful implementation of the Regional Review's policy objectives.

All parties are working hard and in good faith to reach consensus within the region on a set of proposals to implement the policy objectives of the Regional Review. To be successful, the proposals must be founded on a pragmatic assessment of commercial realities, and provide for meaningful and practical incentives for BPA to control its costs.

The recommendations of the Regional Review address transmission policies, Bonneville's power marketing policies, competition at the retain level and support for certain public purposes. I will specifically address the transmission and power marketing recommendations. Since retail competition and public purpose

recommendations are matters before the state legislatures, I will not address those issues today.

Transmission

The Regional Review recommended legal separation of BPA's transmission and generation systems, and the formation of an independent grid operator to operate regional transmission and to be regulated by the Federal Energy Regulatory Commission (FERC). The broad policy objective underlying these recommendations is to create a transmission system whose structure and operation will ensure a fully competitive generation market. Separating BPA's control of transmission from generation is intended to prevent manipulation of access to transmission or the setting of transmission rates to advantage or subsidize the generation system.

Full legal separation and FERC regulation of BPA is a means to this end: transmission would be prevented from cross subsidizing BPA's generation and prevent other uses of the transmission system that would discriminate to advantage BPA generation. This is a goal the DSIs strongly support. However, full legal separation of BPA transmission is complex. If legal separation cannot be achieved without violating the underlying goal, full separation should be reevaluated.

Alternatives to full legal separation of BPA transmission may substantially achieve the policy objective and need to be explored. For example, legislation to subject BPA's transmission to FERC regulation identical to regulation of investor-owned utility transmission – but without the added complexity of legal separation – should be

investigated. (In Order 888, FERC did not require full legal separation of IOU transmission.) In addition, we need to consider whether BPA, within current statutes, can operate the federal transmission system consistent with FERC Order 888, and if FERC can now adequately regulate BPA transmission without requiring legislation.

The DSIs are participating in a work group effort, under the auspices of the Transition Board, to explore alternatives such as these for the separation of BPA transmission. This effort should be concluded in the fall, at which time the complex issue of legal separation should be better understood.

The Report also recommended the creation of an independent transmission system operator, regulated by FERC, which includes BPAs transmission assets as well as other transmission assets throughout the integrated system. Midway through the Regional Review, several investor-owned utilities announced their intent to form an independent grid operator, called IndeGo. Over the past year, intensive efforts have been dedicated to developing IndeGo, including detained study of pricing, governance and operational issues. The DSIs have participated in the development of IndeGo, to the extent allowed for a nonparticipant. This study has revealed how complex and difficult it will be to achieve BPA participation in a regional IGO – primarily because of cost shifting between different transmission systems and among customers. Given the disparate cost structures among various owners of transmission in the Northwest, BPA participation in a regional IGO involves merging its relatively low cost system with systems of substantially higher cost. Despite yeoman efforts by the IndeGo pricing

committee, to this date they have been unable to develop a transmission pricing methodology that does not shift costs to users of the BPA system. The DSIs, as major BPA transmission customers, cannot support BPA joining IndeGo, if the consequence is a doubling – or more – of their transmission rates. The costs simply outweigh the benefits.

The DSIs continue to favor the formation of IndeGo, but do not support BPA joining IndeGo if the result is a significant increase or shift in transmission costs. A preferable outcome is the formation of IndeGo which would then operate in close coordination with the BPA system. If BPA's transmission system is adequately separated and regulated by FERC, this may be an acceptable outcome to all parties. An added benefit of this scenario – essentially two IGOs in the Pacific Northwest – would be that there would be some degree of competition between the two transmission operators. Such competition would be a healthy inducement for keeping transmission costs, terms and conditions reasonable for transmission users.

Subscription

In much of the country, structural changes in power markets have opened up previously monopolistic electric systems to competition. These structural changes have crated a set of problems that are very different from the situation facing BPA. BPA has always faced competition because it has no allocated service territory and because its transmission system has always been an open-access system. The essential problem BPA must address is that it no longer enjoys a substantial price advantage over its

competitors. This problem was addressed in the Regional Review by the proposal to develop subscriptions as a means for BPA to sell its power in the period post-2001, when a majority of its existing power sales contracts expire. The fundamental policy objective is for BPA to establish business relationships that allow for the sale of Federal power at rates that recover the generation costs.

A successful subscription will better align the benefits and risks of access to Federal power, improve BPA's ability to repay Treasury, obviate any need to debate the issue of transition cost or stranded cost recovery, and preserve for the Pacific Northwest the benefits of the Columbia River hydroelectric power system. Achieving these goals will require BPA to find new ways to meet the evolving commercial needs of its customers and, in particular, to reduce the cumbersome process for doing business with BPA. It will also be essential that BPA control its costs so it can offer cost-based services at rates that are competitive with market alternatives.

Under the auspices of the Pacific Northwest Utilities Conference Committee (PNUCC), BPA, its customers and other interested parties have embarked on a collaborative effort to negotiate the terms for subscription of Federal power. As customers have worked with BPA on a business relationship post-2001, it has become increasingly apparent that the subscription process must be flexible to accommodate a wide variety of customers' interests and needs. BPA must not be insulated from the competitive price pressures that provide the best assurance that costs, and therefore rates, will remain reasonable over time. We are participating in the subscription process and remain hopeful that BPA and customers are moving toward a

successful subscription that involves voluntary, arms-length commercially reasonable contracts to meet customers needs and cover BPA's costs.

Transition Costs

There are some in the Northwest that recommend that Congress impose some sort of "stranded-cost" recovery mechanism, either as a backstop in case the subscription process fails, or potentially as a means to compel customers to do business with BPA. Such recommendations are premature, and are contrary to the recommendations of the Regional Review. Adopting a cost recovery mechanism at this time would frustrate the purpose of the subscription effort which his to cover BPA's cost through contracts voluntarily negotiated with customers for the products and services BPA can produce. An orderly process would be to identify whether there *is* stranded cost first and, if there is, then to address it at that time.

BPA's costs through 2001 are covered by its current contracts. We understand that BPA is currently earning surplus revenues for power sales and expects to have $600 million, or more, in accumulated cash reserves at the end of the five-year rate period ending in 2001. By 2001, BPA has stated its intention to get its costs in line with foreseeable market conditions. We are concerned that implementing a fall-back cost recovery mechanism at this time would only serve to relieve BPA of the need and motivation to control its costs.

There is some potential that BPA may have cash flow problems in some years. Cash flow is a problem, but it is

inherent in setting rates for fixed periods in advance of actual knowledge of costs and sales with which BPA has always had to deal. There are many mechanisms to bridge cash flow shortfalls that do not involve making open-ended commitments to pay whatever BPA's costs happen to be in any future year. BPA can use its cash reserves, arrange for short term credit, or defer expenditures, much in the way it always has. Simply giving BPA a new taxing mechanism to generate revenue will be a disincentive to controlling their costs and could substantially jeopardize a successful subscription process.

Process

As a final point, I would like to address the Committee's question about BPA's participation in the Transition Board's efforts, and raise a concern with the level of process generally. Since its inception, the Regional Review process has been an inclusive attempt to bring customers, BPA, the states and other interests together to devise a transition for BPA to a more competitive environment. The Transition Board was established to track the progress of BPA, customers and other interested parties in implementing the policy goals outlined in the Final Report, and as a conduit to communicate to Congress on any need for legislative action the region might identify. I believe that BPA, customers and other interests are working hard and in good faith with the Transition Board toward successful implementation of these policy goals.

Increasingly, however, the Transition Board appears to be attempting to set policy and procedures for BPA. Earlier I stated that BPA needs to find more efficient

means to conduct its affairs and meet the commercial needs of customers. I am concerned that subjecting BPA's marketing and operational decision-making to multiple public processes under the umbrella of the Transition Board or the Northwest Power Planning Council could impede instead of help BPA's efforts to operate more efficiently in a competitive environment. BPA has the statutory responsibility to manage its power marketing activities and its practical authority to manage its affairs should not be unduly encumbered by multiple layers of political oversight.

The level of process in the Northwest is extreme. For example, one DSI member company believes that its individual share of the cost of participating in the regional processes necessary to do business with BPA totals over $500,000 per year, every year, in excess of the costs that it would incur if it eliminated BPA as a supplier. Not only does BPA need to control its costs, if BPA is to be competitive with other suppliers, the excessive processes associated with doing business with BPA need to be eliminated.

Conclusion

BPA and its customers are actively engaged in exploring new business and structural arrangements to carry out the broad policy goals of the Regional Review. The Transition Board is overseeing this effort. The process is on schedule to replace BPA's existing power sales contracts with new voluntarily negotiated contracts before they expire in 2001. It is incumbent upon all of us to give this process every possible chance to work. If the subscription process is a success then BPA's costs will be

covered, the federal debt will be repaid and there will be an orderly transition to a competitive marketplace. Congress should not condone any so-called "transtion cost" proposal that would vitiate BPA's incentive to control costs and deprive the Pacific Northwest of the benefits of competition.

Thank you for this opportunity to testify before you on this important matter.

EXHIBIT C

Direct Service Industries, Inc.

[Address Omitted In Printing]

VIA TELEFAX

To: Phil Moeller, Legislative Assistant to Senator Gorton
From: Steve Waddington, Executive Director
Date: October 20, 1997
Subject: Federal Legislative Input

Thank you for your memorandum requesting ideas on what issues to address in a "Northwest title" of electricity restructuring legislation. We appreciate Senator Gorton's efforts to appropriately address Northwest issues in any national bill.

I would like to suggest three principles to apply to any proposed legislation addressing the Northwest electricity system.

First, any legislation should work to conform the Northwest system to the same legal and regulatory framework that will apply in the rest of the nation. While we agree that some features of the Northwest may deserve unique treatment, unique treatment should be rare and should take the form of narrow exceptions to the general rule of uniformity. In the deregulated competitive electricity market, the Northwest system will integrate into a national market. Treating the Northwest different from the rest of the nation will reduce for the Northwest the benefits of this larger competitive market.

Second, any legislation regarding the Northwest should be broad in nature, and avoid detailed prescriptive measures. For example, instead of trying to write legislation that specifies in detail how to regulate Bonneville Power Administration's (BPA) transmission, this question should be entrusted to the Federal Energy Regulation Commission (FERC) under the generally applicable statutory framework of the Federal Power Act.

Third, legislation must be compatible with competitive markets and must rely on market forces to develop flexible solutions for changing circumstances.

Specific Comments

Our perspective on the five issues on which you requested specific comment follows.

1. *How and to what extent should the Bonneville transmission function be separated from its power marketing function?*

BPA's transmission function should be completely separate and independent from its power marketing function to promote competition and avoid self-dealing. Effective separation is achievable with legislation that subjects BPA's transmission to full regulation by FERC. Such regulation should impose the exact same rules on BPA transmission that apply to other transmission owners regulated by FERC under the Federal Power Act.

The DSI's are working with other customer groups on draft legislation to carry out maximum separation through FERC regulation. We would support the proposal that was submitted to you today by Northwest Investor-owned Utilities, entitled: *Federal Energy Regulatory Commission regulation of Bonneville Power Administration Transmission System.*

2. *What role and what standard should FERC have in setting Bonneville transmission rates and rates for electricity?*

BPA should develop *proposed* rates for electric power and transmission as it does now. However, the current BPA process (Section 7(i) of the Northwest Power Act) for hearings on the rates should be abandoned. Instead, BPA's proposed rates should be subject to FERC regulatory oversight and approval (or modification) as described below. In the FERC rate setting process, FERC should accord BPA only such deference it normally accords to a public utility.

Transmission

FERC should have full regulatory authority over BPA's transmission rates, terms and conditions under the Federal Power Act. Authorize FERC to apply the same standards to BPA transmission that FERC applies to all other public utilities that it regulates.

Power Sales

The wholesale power market is generally highly competitive and requires very little regulation. Grant FERC authority to determine if BPA has market power (excessive control) in any relevant wholesale market. Allow BPA to charge market-based rates like for any public utility unless market power exists. Where BPA has market power, BPA's power rates should be subject to complete FERC regulatory oversight under the Federal Power Act. In addition, preserve the cost-based rate making provisions in Section 7 of the Northwest Power Act for those customers that elect to continue cost-based service.

3. *How should an appeal process of this rate setting be handled?*

Eliminate the current practice of judicial review of BPA's rate decisions. Appeals should be taken from FERC's decisions approving or modifying BPA's rates, terms and conditions as provided for under the Federal Power Act.

Under the Federal Power Act, a party may preserve issues for review by requesting rehearing at FERC. If FERC fails to give the requested relief on rehearing, an appeal may be taken within 60 days, either to the United

States Court of Appeals for the D.C. Circuit or to the United States Court of Appeals for the Circuit in which the utility operates (the Ninth Circuit for BPA). A court will normally give deference to FERC's determinations on how to apply the broad standards of the Federal Power Act.

4. *If Bonneville has stranded costs – above market rates due to various financial commitments – how should these costs be recovered?*

With regard to BPA, there is an important distinction between "stranded costs" and short-term cash flow. BPA may not have any stranded costs in the traditional sense as defined by FERC. BPA may, however, continue to have cash flow problems. It is not appropriate to use stranded cost recovery to protect BPA from periodic cash flow variances. Rather, it is appropriate for BPA to defer its payments to the U.S. Treasury to cover cash flow deficiencies. Provided such deferrals are repaid by BPA with then current market rates of interest, there is no harm to Treasury from continuing this traditional approach.

BPA stranded cost recovery and transmission rate setting are also separate issues. Transmission rates should be set to recover transmission costs only. Any BPA stranded power cost problem must be addressed separately. FERC should be given full regulatory authority over any BPA stranded cost proposal. Authorize FERC to apply the same standards that it applies to all other public utilities that it regulates (ie., Orders 888 and 888a.)

The power generating assets of BPA should, over their life, produce power with a market value well in excess of their costs. (The Northwest Power Planning

Council recently estimated that the net present value of BPA's system is $1.7 billion.) BPA may have a near-term cash flow problem if the market price of power is low when most of its power sales contracts expire in 2001. However, when BPA's net billing obligations (i.e., WPPSS nuclear plants) expire, BPA's costs should be very competitive. BPA's competitiveness will depend on the level of spending and other factors over which the federal government (acting through BPA, the Corps of Engineers, the Bureau of Reclamation and the National Marine Fisheries Service), but not customers, will have control.

Customers should not be forced to bear the cost of decisions over which they have *no* control. But in return, however, it does not seem appropriate to allow customers to retain a future right to purchase power "at cost" unless those same customers agree in the near-term to buy power at rates adequate to cover BPA's near-term needs. Therefore, customers should be required to choose: alternative one, customers can choose to depend entirely on market rates, but they would have to expressly relinquish future rights to purchase "at cost." Under this option, the long-term benefits of the system (cheap power after the WPPSS payoff) abandoned by historical customers would revert to the federal government. Alternative two, customers can choose to buy BPA energy "at cost" now and in the future. This may result in energy costs in the short-term over market, but is predicted to result in cheaper rates (at cost) in the long-term (after WPPSS payoff). In other words, customers should either accept the near-term risks along with long-term benefits, or allow both the risks and the benefits to revert to the federal government.

5. *What are the essential elements in any proposal for a new Northwest governance structure for the Columbia River System?*

The essential element in any legislation is a recognition that the competitive marketplace will absolutely limit BPA's ability to generate revenues to pay for Endangered Species Act measures and other fish and wildlife expenditures. Legislation must create a workable means for BPA to budget for fish and wildlife at a predictable and affordable level. If ESA requirements are more than the market will pay for BPA's power, funding and management must be treated as a government responsibility and not be the responsibility of the business enterprises of selling and transmitting power.

Phil, I hope this is responsive to your request. Congratulations to you for joining Senator Gorton's staff and good luck in your efforts in the challenging area of electricity restructuring. Please feel free to call me if you have questions, or contact either Bob Hayes or Irene Ringwood inside the beltway at: 202-638-3307.

EXHIBIT D

After further discussion BPA moved to

- Will work on developing a defensible indexed rate: Need more information on Aluminum price forecast.
- When on the floor will waive take-or-pay when load is curtailed
- No Renewal rights.

Rates Hearing Room

BPA/DSI Meeting **June 9, 1999**

Paul N. started meeting by indicating Syd was prepared to go through what was being offered, and to answer questions.

Syd:

- Wanted to bring clarity to questions/issues that were presented.
- Firm power block, no services – 1500 aMW
- Allocation based on 1997-2001 purchases
- Price: 23.5 m/kWh, eligible for C&R Discount
- Indexed Rate:
  Floor 19.0 m/kWh/ $0.60/lb Aluminum
  Ave 23.5 m/kWh/ $0.66/lb
  Ceiling 28.5 m/kWh/ $72.0/lb
- While on the Floor (19.0 m/kWh) Take-or-Pay will be waived with comparable load reduction.
- VI Rate Design to be adjusted by forward price curve and forecasted aluminum prices.
- Purchases subject to CRACK.
- Stranded cost exposure for term of the contract
- May negotiate individual deals for operating reserves
- Willing to negotiate with Morgan Stanley and the DSI
- Not tied to secondary
- Some thinking of tethering to secondary
- If BPA gets the DSI support BPA will place this proposal in the initial Rate Proposal and defend it.

- DSI must be willing to support even if though it may not meet all their needs. Support in the rate case, stop heavy lobbying in Washington D.C., hold lawsuit in abeyance. Syd Berwager will email a draft of what will be needed a letter from the DSIs.

DSI had a strong negative reaction the letter and what their response must be. That it was unfair that they had to make those commitments when BPA other customers didn't.

Indexed Rate does not work as specified.

Rates Hearing Room

BPA/DSI Meeting **June 14, 1999**

Here today to reach an understanding of BPA's proposal. This effort has extended for 2-3 months. Expect Ex Parte to start Friday.

- BPA felt Syd's email was clear about what was expected from the DSI in a letter.

EXHIBIT E

BALL JANIK LLP

ATTORNEYS

[Name And Address Omitted In Printing]

August 31, 1999

The Honorable Brian Baird
1721 Longworth House Office Building
Washington, DC 20515

Dear Representative Baird:

Thank you and your staff for the hard work on the draft Northwest Chapter for possible inclusion in a House energy restructuring bill. Many of the Northwest aluminum companies provided comments to you on earlier drafts. This letter, regarding the August 3 draft, is on behalf of the following companies: Alcoa Inc., Columbia Falls Aluminum Company, Goldendale Aluminum Company, Kaiser Aluminum & Chemical Company, Northwest Aluminum Company and Reynolds Metals Company.

There are some improvements in the August 3 version; nonetheless, we still cannot support the proposed draft. We feel strongly that it does not address today's most pressing regional energy problems, namely, Bonneville's implementation of regional preference and full legal separation of its transmission and generation systems.

First, as we said in our earlier comment, the companies believe that any Northwest Chapter must address and restore the concept of regional preference. The region

would be remiss if we failed to take the opportunity of national energy restructuring to reinforce the purposes of regional preference. Regional preference was established as a quid pro quo for Bonneville's authority to develop the North-South transmission intertie. At that time, there was concern that with the construction of the intertie to California, the benefits of the Northwest hydro system would be shipped south. Early concerns were that California would *demand* the power, and BPA would be forced to comply. Today, Bonneville is *voluntarily* selling into the California market to underwrite the rates of a limited class of customers. Either way, it contravenes the intent of regional preference.

The integrity of regional preference is being eroded. Instead of offering seasonal surplus and non-firm energy in the region at cost-based rates, BPA now offers such power to some Northwest customers at above cost prices that are tied to the California Power Exchange (PX). While that may maximize the subsidy to BPA's public agency customers, it diminishes the application of regional preference and causes infighting in the region among customer groups which have historically shared the benefits of the hydro system.

If we are to continue to value the concept of regional preference, this practice must be halted. Regional preference was always intended to have broad application. In layman's terms which all can understand, "customers in the Northwest should get first bite at the cost-based apple." Thereafter, Bonneville may sell power outside the region. This needs to be clarified for regional protection against encroachment from outside the region, and the Northwest Chapter is the right vehicle.

Second, the draft has advanced the issue of FERC oversight of BPA's transmission, but the companies believed that full separation of BPA's transmission and generation systems should also be included in this bill. There is a growing belief among customer groups, and perhaps even BPA, that this issue is ripe and ready for inclusion in the Northwest chapter.

Finally, the companies continue to believe that the transmission surcharge is unnecessary and bad public policy; which may explain why there is no consensus among regional parties. We are struck by the diametrically opposed views expressed by major stakeholders. For example, in referring to its recommended changes to the chapter, the Public Power Council states in **hold** type on page one of its comments: "These concerns are not minor, and must be satisfactorily resolved for public power to be at all comfortable with the legislation." PPC urged that any transmission surcharge be uniform. In contrast, the IOUs stated that "Mandating a 'peanut butter' approach (or uniform surcharge) is not acceptable." The latest draft does not require a uniform surcharge. Since the publics were insistent on that point, there appears to be no consensus. But, of course, you could not satisfy two groups holding diametrically opposed positions. There are other issues where customers line up on opposite sides with no apparent common ground (i.e., rigid application of FERC standards, retail sales).

Inasmuch as it appears that there is no regional consensus in support of the draft Northwest title and there is opposition to important elements, we believe the Northwest chapter should be taken back to the drawing board.

After reviewing the draft legislation being circulated by Rep. Joe Barton, Chairman of the Energy and Power Subcommittee, it is even more apparent that a Northwest chapter must not be a narrow attempt at improvement, but rather address the broader Power Marketing Administration reforms advanced in the Barton bill.

We have said to you and to our fellow BPA customers that we believe the regional act no longer works in this changing energy environment. It needs to be revisited *in its entirety,* not amended piecemeal over a period of years. We look forward to working with you and other regional parties on comprehensive legislation to address the many unique issues facing the Northwest power system.

Sincerely,

/s/ RBH/ls
Robert G. Hayes

RHG/ls

PLEASE DISTRIBUTE TO:

Bruce Mizer - ..... (fax 916/971-0558)

Pete Forsyth - Kaiser Aluminum (fax 503/238-3908)

Susan Ashe & Joe Hoemer - Kaiser Aluminum .....
(fax 509/468-5864)

Bob Cole - Kaiser Aluminum ..... (fax 202/638-1991)

Lee Califf - Reynolds Metals ..... (fax 202/898-0693)

Ken Berry & Ken Younger - Reynolds Metals .....
(fax 804/281-3740)

Steven Waddington - ..... (fax 503/493-2386)

Gerry Miller – Goldendale Aluminum ..... (fax 360/944-9930)

Brett Wilcox – Northwest Aluminum ..... (fax 541/298-0800)

Jack Speer – ALCOA ..... (fax 509/663-9399)

Russ Wisor – ALCOA ..... (fax 202/956-5305)

Paul Murphy – Murphy & Buchal ..... (fax 503/227-1034)

Michael Early ..... (fax 503/402-8882)

Joe Piedmont – Gallatin Group ..... (fax 503-220-0867)

Eric Redman – Heller Ehrman ..... (fax 206/447-0849)

Jim Stromberg – CFAC ..... (fax 425-450-5569)

Bob Brown – CFAC ..... (fax 406-892-8201)

FROM: **Irene Ringwood** **DATE: 8/31/99**

NUMBER OF PAGES TRANSMITTED (INCLUDING COVER SHEET): 4

The attached letters were mailed to the following individuals:

The Honorable Brian Baird
The Honorable Earl Blumenauer
The Honorable Helen Chenoweth
The Honorable Michael Crapo
The Honorable Norm Dicks
The Honorable Slade Gorton
The Honorable Rick Hill
The Honorable Jay Inslee
The Honorable Jack Metcalf
The Honorable George R. Nethercutt
The Honorable Adam Smith

The Honorable Greg Walden
The Honorable Ron Wyden
The Honorable Max Baucus
The Honorable Conrad Burns
The Honorable Larry Craig
The Honorable Peter A. DeFazio
The Honorable Jennifer Dunn
The Honorable Richard Hastings
The Honorable Darlene Hooley
The Honorable Jim McDermott
The Honorable Patty Murray
The Honorable Mike Simpson
The Honorable Gordon H. Smith
The Honorable David Wu

EXHIBIT F

GOLDENDALE ALUMINUM COMPANY
KAISER ALUMINUM & CHEMICAL COMPANY
NORTHWEST ALUMINUM COMPANY
REYNOLDS METALS COMPANY
COLUMBIA FALLS ALUMINUM COMPANY

September 28, 1999

Paul Norman,
Senior V.P. for Power Business Line
Bonneville Power Administration
Routing P-6
P.O. Box 3621
Portland, OR 97208-3621

RE: Compromise Approach

Dear Mr. Norman,

You have expressed disappointment that a letter sent to the Northwest Congressional Delegation on August 31, 1999, failed to indicate any support for the Compromise

Approach. The undersigned companies, all of whom signed concurrence letters indicating support for the Compromise Approach, assure you that we do support the Compromise Approach and intend to abide by the Approach and letters as long as BPA fully supports the Compromise Approach in the rate case. However, the companies did not then and do not now view the August 31st letter as an appropriate vehicle to indicate support for the Compromise Approach. The letter of August 31st commented on the Northwest Chapter of the National Energy Bill; it was not intended to address the rate case. In addition, the letter was sent on behalf of a group that included Alcoa and, therefore, not all of the companies listed in the August 31st letter signed concurrence letters or support the Compromise Approach. Not withstanding the August 31st letter, the undersigned companies continue to support the Compromise Approach, and we will be informing the Delegation of this support.

At the same time, our support for the Compromise Approach, as many of us informed you prior to signing the concurrence letters, is support for a methodology for setting an IP variable rate. We did not agree that a rate pegged at 23.5 mills/k-Wh, with a variable rate centered on a 68c/lb. aluminum price was acceptable. We agreed to a framework for calculating the average IP rate and variable rate which we hope will produce a rate acceptable to the companies and that includes the following:

> "The variable rate design will use this basic rate design. It will be adjusted (shifted higher or lower along the aluminum price axis) to reflect the aluminum price forecast developed in the rate case. The basis for the rate case aluminum

price forecast will be forward price curves and aluminum price forecasts provided to BPA by independent consultants."

We are concerned that BPA's rate case may not, in fact, be consistent with the Compromise Approach as we interpret it. BPA testified that it is not sponsoring an aluminum price forecast in this rate case. When asked during discovery for the aluminum price forecasts provided to BPA by independent consultants, we were told all such forecasts are proprietary and are not available to us. How can BPA base its rate case decision on the rate case record and base the variable rate on an aluminum price forecast provided to BPA by independent consultants if BPA does not put the forecasts into the record?

We also asked for BPA's back-up for the forward price curve on which BPA apparently based its IP variable rate proposal. We received answers that suggest the variable rate proposal was based on casual and undocumented discussions, the basis of which cannot be tested in any evidentiary sense. During clarifying, BPA's witnesses made numerous statements emphasizing that BPA is motivated primarily to obtain a risk-free and totally hedged position. This is not what the companies agreed to. We agreed to a variable rate based on a reasonable forecast of aluminum prices for the rate period. From our perspective, properly fitting the aluminum price forecast to the variable rate was a material element of the Compromise Approach. BPA's testimony in the rate case does not constitute BPA's supporting the Compromise Approach as we understand it.

We would like to meet with you to determine whether we have a mutual understanding of what the

Compromise Approach entails and to assure ourselves that we all fully understand the expectations of the respective parties.

Signed,

Reynolds Metals Company

By: /s/ [Illegible]

Kaiser Aluminum & Chemical Corporation

By: /s/ [Illegible]

Columbia Falls Aluminum Company

By: /s/ [Illegible]

Goldendale Aluminum Company

By: /s/ Gerald F. Miller

Northwest Aluminum Company

By: /s/ [Illegible]

EXHIBIT G

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF ENERGY
BEFORE THE
BEFORE THE BONNEVILLE
POWER ADMINISTRATION

2002 WHOLESALE)
POWER RATE)
) BPA Docket No. WP-02
ADJUSTMENT PROCEEDING)

PROCEEDINGS

DATE TAKEN: January 24, 2000
TIME: 9:00 a.m.
PLACE: Bonneville Power Administration
Portland, Oregon

* * *

[p. 266] was different things discussed, some of it was received well, some of it was received not so well.

Q. Do you have a recollection of what the reference in the paragraph above it to stop heavy lobbying in DC referred to?

A. (Mr. Clark) I think that refers to that we needed support for the compromise approach for going forward with it, and that support needed to be here in the Northwest, and that support also needed to be in Washington.

Q. Going back to the letters that you received on June 18th, the packet in Exhibit 32?

A. (Mr. Berwager) Exhibit 32 is the letters we received on the 16th.

Q. I'm sorry. That's what I meant.

A. (Mr. Berwager) You meant that.

A. (Mr. Oliver) Should we keep 6 and 8 out at the same time?

Q. Yes. Am I correct that no company, in the June 16th letters, provided the level of support that Bonneville wanted?

A. (Mr. Berwager) I'm not sure I could say no company did, but –

Q. Can you show me which one you think did?

A. (Mr. Berwager) Well, no.

Q. So, no company?

[p. 267] A. (Mr. Berwager) I'm sorry, Michael?

Q. If you think a company letter dated June 16th provided you with adequate support I'd like to know which one it was?

A. (Mr. Berwager) I can't point out such a letter right now.

A. (Mr. Oliver) The last sentence said the letters did not address in a clear and consistent manner issues important for BPA to make this decision.

Q. So the response was that basically Bonneville drafted a letter for the companies, is that right?

A. (Mr. Berwager) Well, what we were trying to do after receiving the letters in 32 was to get a little clearer about what Bonneville would need to see in terms of

support, because the letters we received on the 16th, the support was very inconsistent and didn't meet what we had hoped to see in terms of commitments to support.

Q. But the letter, the June 16th compromise letter that was then signed by some of the companies, Bonneville then drafted that letter because the responses they received on June 16th, the individual company drafted letters were not adequate?

A. (Mr. Berwager) Right. And that led to the letter of June 18th.

Q. Right. But Bonneville was the drafter of that [p. 268] letter?

A. (Mr. Berwager) Right.

Q. Could you next look at Exhibits 4 and 7?

A. (Mr. Berwager) Yes, I've got them.

Q. Now, are you familiar with the letter that's from the aluminum companies and signed the compromise to Paul Norman that's Exhibit No. 7?

A. (Mr. Berwager) I've seen that letter, yes.

Q. Do you know what was the cause for – what caused the companies to sent this letter to Mr. Norman?

A. (Mr. Berwager) No. You're talking about the letter Paul sent to the companies?

Q. Oh, I'm sorry. No – is there a letter Paul sent to the companies?

A. (Mr. Berwager) I'm sorry. I'm sorry. You're right, yes, the September 28th letter from the companies to Mr.

Norman, excuse me. Am I familiar with what caused that letter?

Q. Well, yes. Are you familiar with the circumstances that led to the companies sending that letter?

A. (Mr. Berwager) I have some recollection, yes.

Q. The letter – the September 8th letter references the September – the September 28th letter references an August 31st letter by the companies to the Northwest Congressional Delegation. If you'd like at Exhibit 4, that [p. 269] *is that letter?*

A. (Mr. Berwager) Yes.

Q. Have you seen this letter before?

A. (Mr. Berwager) I do have that letter.

Q. And did you have any conversations with any of the companies or company representatives about this letter?

A. (Mr. Berwager) Did I?

Q. Yes.

A. (Mr. Berwager) I believe so.

Q. Who did you have the conversation with?

A. (Mr. Berwager) I cannot recall.

Q. But it was a company representative?

A. (Mr. Berwager) Yes.

Q. Do you remember the content of the discussion?

A. (Mr. Berwager) Yes.

Q. Could you describe that for me, please?

A. (Mr. Berwager) Well, the content of the discussion was that the compromise letter called on the companies to indicate their support for the compromise approach. And when we read this letter of August 31 it was pretty deficient in any indication of support for the compromise approach. We couldn't see it.

Q. So your sense was that this letter was not –

A. (Mr. Berwager) It was a missed opportunity to indicate support for the compromise approach, that's the way [p. 270] *we viewed it.*

MR. WRIGHT: Your Honor, I hate to interject myself again, but we've been meandering through this thicket of documents for quite some time. And I still don't have a clear idea of what foundation has been laid. And so I would, I guess, request that we get some direction from Mr. Early about where he's going with this and how long it might take.

MR. EARLY: Well, basically we're trying to lay a foundation for the fact that the compromise agreement required the signers to do certain things. And those related to positions they would and would not take in the rate case, positions they would and would not – statements they would and would not make in the wider political process. Actions they would or would not take in litigation, both on the subscription ROD and subsequent in the rate case appeal. And the reason these documents are relevant, because they relate to the companies positions prior to the compromise agreement. And indicate the nature of the obligation imposed upon them. They provide the context for the agreement to do or not do something.

MR. WRIGHT: It seems to me that the witnesses have testified that, yes, indeed, there was a compromise agreement. Yes, indeed, it did require the signers to do certain things, among those things they were required to do was to show support, to refrain from certain actions and that [p. 271] *those actions included actions both locally and in Washington, D.C. And I don't know what else there is there to be gained from going through all these letters. It seems to me that if you forgot to put something in your direct case, you can't just put it in now.*

MR. EARLY: Your Honor, we're prepared to move on to –

HEARING OFFICER EDWARDS: I think that's a good idea. If you have questions about the compromise approach, ask those questions directly of the witnesses. It's not necessary to dance around through a myriad of documents that basically do nothing more than reflect the misunderstanding as to who said what to whom when and seems to be a nonissue, because it's been cleared up. So let's move on.

BY MR. EARLY:

Q. I'd like to ask you about the companies obligations under the compromise agreement. And your understanding of what issues they agreed to not address. And specifically I'd like to clarify that portion of your testimony which reflects that if all of the companies agreed to the compromise there would be relatively few issues that would not have been addressed. So I'd like to ask you first, for the companies that signed the compromise, are they agreed – are they bound to support that the total

amount of subscription power available to the DSIs is 1440 and no more?

[p. 272] A. (Mr. Berwager) That was an important part of the compromise approach. So, yes, part of – the background is that before there was an agreement on the compromise approach Bonneville had on the table what we called the targeted augmentation approach. And what we had been hearing from some of the companies was we need more than that. And our message back to the companies was, offering you power at any amount at any price is a discretionary action by Bonneville. And in order for us to ask the other customers of Bonneville to accept additional costs and additional risk, we had to be able to see that there was some acceptance, that the companies said, yes, that additional offer you're making scratches some itch we have, because we tried to make it clear that if what we were going to say is our itch still isn't scratched, the targeted augmentation strategy was all Bonneville was ready to put into its initial proposal.

Q. Thanks. I don't need a long explanation, just a yes, I'd take it.

MR. MURPHY: I'd like to have the witness, if he's going to answer these questions yes or no, to refer to the compromise approach. If there's a claim that there's an agreement to some 1440, I'd like him to indicate where it is in the compromise approach. I understand I don't get recross, and therefore I'm concerned about mistakes being made on the record and no ability to clean them up.

[p. 273] MR. WRIGHT: Your Honor, I think the witness should be able to explain his answer to the extent he believes necessary to make it clear, and he shouldn't

be limited to a yes or no response to these complex questions of policy. They're not just black and white, easy yes and no questions and issues.

MR. EARLY: I'm sorry, Your Honor. I was just trying to move along.

BY MR. EARLY:

Q. Would you identify – for the first question, are they bound by a total amount of subscription power at 1440, I took your answer to be yes. Could you identify where in the –

A. (Mr. Berwager) At the top of Attachment 1, the – Attachment 1 to the June 18th letters is the description of the compromise approach. And at the top of that document dated June 17th entitled Compromise Approach we say the amount is 1500 average megawatts, approximately 75 percent. The idea was that 75 percent of what the companies had been purchasing in the '97 through '01 period was what was being offered in the compromise approach.

Q. Are the companies that signed the agreement bound to support the allocation of the 1440 based upon the relative amounts of IP purchases in the FY 97-2001 time period?

A. (Mr. Berwager) I see that as part of the compromise

* * *

EXHIBIT H

Department of Energy

Bonneville Power Administration
P.O. Box 3621
Portland, Oregon 97208-3621

[SEAL]

POWER BUSINESS LINE

June 18, 1999

In reply refer to: P-6

Mr. Brett Wilcox
President
Goldendale Aluminum Company
85 John Day Dam Road
Goldendale, WA 98620-9302

Dear Mr. Wilcox:

On June 2, 1999, BPA met with representatives of its Direct Service Industrial (DSI) customers and described a Compromise Approach (see the enclosure) to post-2001 service to the DSIs that BPA would propose in the Initial Proposal to the upcoming Rate Case, if BPA had support for it from the DSIs. BPA appreciates the effort of Goldendale Aluminum Company and the other DSIs to try to resolve this issue in good faith. However, the recent letters BPA received from the DSIs in support of BPA making this proposal varied greatly in their contents. The letters did not address, in a clear and consistent manner, issues that are important to BPA in making this important decision.

This letter is intended to create the clarity necessary for BPA to decide that BPA has the support necessary to

move forward with the Compromise Approach proposal in the Rate Case Initial Proposal. Without concurrence by the DSIs on the following issues, BPA will not be able to move forward with that proposal. Instead, the Initial Proposal will have to reflect an earlier proposal (the so-called Targeted Augmentation Approach) BPA placed before the DSIs on April 26, 1999.

BPA needs Goldendale Aluminum Company to agree to the following:

1. BPA will propose the Compromise Approach in the Initial Proposal for the Rate Case, and Goldendale Aluminum Company will support the Compromise Approach throughout the Rate Case so long as BPA continues to do so. The intent of the average rate and the variable rate in this proposal is to collect $23.50 per megawatt-hour on average over the rate period, as adjusted pursuant to the Compromise Approach. Goldendale Aluminum Company may submit evidence on the record during the rate proceeding addressing the reasonableness of the aluminum price forecast, and argue for adjustments as provided for in the Compromise Approach.

2. For as long as BPA is proposing the Compromise Approach in the Rate Case, Goldendale Aluminum Company will support the Compromise Approach in the rate case, and will so indicate in discussions outside the Rate Case venue. Goldendale Aluminum Company may describe publicly the positions it is taking in the Rate Case.

3. For as long as BPA is proposing the Compromise Approach in the Rate Case, Goldendale Aluminum Company will not oppose in the Rate Case those elements of the Initial Proposal that relate to the

establishment of rates for firm power service to the Investor-Owned Utilities for FY2002-2006 as provided in BPA's Subscription Strategy. BPA will propose in the Rate Case a procedural method by which Goldendale Aluminum Company may preserve its ability to litigate within the limitations of this letter.

4. At the end of the Rate Case, if the Compromise Approach is substantially sustained in BPA's Rate Case Final Record of Decision, Goldendale Aluminum Company will not legally challenge the Compromise Approach, but Goldendale Aluminum Company may challenge BPA's decisions regarding adjustments as provided for in the Compromise Approach pursuant to Paragraph 1 above.

5. If the Compromise Approach is substantially sustained in the Rate Case Final Record of Decision, and Goldendale Aluminum Company desires to purchase power from BPA at the resulting rate, a condition of such sale is that Goldendale Aluminum Company will not file a lawsuit challenging the sale of power under the Subscription Strategy to serve the residential and small farm loads of the Investor-Owned Utilities, or the rates for such sales, for the FY2002-2006 period, unless a party representing the interests of the residential and small farm customers of the investor-owned utilities files a lawsuit challenging the power sales or rates for service to the DSIs.

6. With regard to the legal challenge to the Subscription Strategy Goldendale Aluminum Company has filed in the Ninth Circuit, for as long as BPA is proposing the Compromise Approach in the Rate Case, Goldendale Aluminum Company will argue for holding the suit in abeyance. If the Compromise Approach is substantially sustained in the Rate Case Final Record of Decision, including a reasonable aluminum price forecast, Goldendale Aluminum Company will withdraw the

lawsuit challenging the Subscription Strategy, unless a party representing the interests of the residential and small farm customers of the investor-owned utilities continues a lawsuit challenging the Subscription Strategy's provisions regarding service to the DSIs.

7. Goldendale Aluminum Company need not relinquish its rights to intervene in lawsuits filed by others challenging its benefits.

Please indicate your agreement by signing the concurrence line below and returning the letter to BPA by 5 p.m., PDT on June 18, 1999. You may fax the letter to 503-230-7333.

Sincerely,

/s/ Paul E. Norman
Paul E. Norman
Senior Vice President
Power Business Line

Enclosure

Concur: /s/ Gerald F. Miller

Name: Gerald F. Miller
(Print or type) Vice President

Company Goldendale Aluminum Co.

COMPROMISE APPROACH

This is the approach that BPA would propose as part of the Initial Proposal for the upcoming Rate Case if the DSIs are willing to support it.

Product:	Firm Power Block (without load following), take-or-pay
Amount:	1500 aMW, approximately 75 percent of FY97-01
Allocation:	Based on the relative amounts of IP purchases in the FY97-01 time period
Price:	$23.50 per MWh (for undelivered, 100% annual load factor power) $23.00 per MWh with C&R discount

C&R Discount:

The Company will be eligible for discount ($0.50/MWh), subject to the same standards and procedures as utilities participating in the C&R program.

Flexible IP Index (Variable) Rate Design:

The following Variable Rate design, applicable to aluminum smelter operations, will be used in the Initial Proposal for the upcoming Rate Case.

Floor rate:	$19.00 ($18.50 w/ C&R discount)
Lower Pivot Point:	$0.06 below aluminum price forecast developed in the Rate Case
Average rate:	$23.50 ($23.00) at aluminum price forecast developed in the Rate Case for the FY2002-2006 rate period.
Upper Pivot Point:	$0.06 above aluminum price forecast developed in the Rate Case
Ceiling rate:	$28.50 ($28.00)

The variable rate design will use this basic rate design. It will be adjusted (shifted higher or lower along the aluminum price axis) to reflect the aluminum price forecast developed in the Rate Case. The basis for the Rate Case aluminum price forecast will be forward price curves and aluminum price forecasts provided to BPA by independent consultants. Forecasted revenues under the Flexible IP Index Rate must be equivalent to or greater than $23.50 ($23.00) over the FY2002-2006 period.

For the Initial Proposal, BPA will use an aluminum price forecast of $0.68 per pound for the FY 2002-2006 rate period (LME 3-month).

At the time a DSI signs its new Power Sales contract, it will have to choose whether to take service under the Variable Rate design or under the standard rate. Each aluminum company's choice will apply to all of its smelting operations.

Take-or-Pay/Mitigation:

These contracts will be take-or-pay arrangements. If the Company reduces load to the extent that it cannot accept deliveries of the amount of power it is obligated to purchase, BPA will remarket the power for the Company. The Company will continue to pay for the contracted amount of power but BPA will provide a credit to the Company for the amount of energy remarketed. The amount of this credit will be capped at the rate paid under this contract minus any remarketing fee.

The only exception to this take-or-pay obligation is available to DSI's who, at the time they sign a contract, elect to

take service under the Variable Rate, and simultaneously elect the Floor Rate Curtailment Take-or-Pay Waiver option. For any company making this dual election, if the company reduces load at the time aluminum prices are such that the electric price is at the Floor Rate, the Company will reduce its take-or-pay obligation on BPA. The amount of the take-or-pay reduction will be equal to the pro-rata share of plant load that had been served by BPA just prior to the reduction in plant load. Once having reduced load under this approach, the Company will have given up its contract right to restore service to the curtailed load under the Compromise Approach agreement. The amount of power subject to stranded cost recovery charges (see Stranded Cost, below) will not be reduced by the amount of this take-or-pay reduction.

Stranded Cost:

Sales under this arrangement would be subject to the power CRAC. The CRAC will be added to the Variable Rate and the Average Rate. With regard to other stranded cost mechanisms, the power sales contract will be explicit that, for as long as the Company continues to purchase cost-based power from BPA, the new contract supersedes existing contracts and the Company will be subject to same exposure as BPA's utility customers purchasing subscription power.

Dividend:

Sales under this Compromise Approach arrangement would be eligible for a share of the potential "dividend"

in the same way that Subscription sales to other customers would make those customers eligible for a share of the dividend.

Amount and Cost Basis:

(a) Under this Compromise Approach, 1500 aMW will be available to the DSI's. 1500 aMW was selected set because it represents a large portion (approximately three-fourths) (of the load placed on BPA during the previous 5 years at a cost-based.

(b) Of that 1500 aMW amount, 1000aMW(?) will be served using a cost-basis approach consistent with the IP-PF relationship of 7(c)(2) of the Regional Act. BPA expects to serve 200 aMW out of its critical inventory. An additional 800 aMW (an amount equal to approximately 40 percent of the amount of secondary energy BPA expects to have in an average year during this period) will also be made available. (BPA is not committing to serve DSI loads with secondary energy; instead, BPA intends to augment its firm inventory as appropriate to serve this load without decreasing the amount of secondary energy available for sale at market prices.) The cost basis for this component of DSI service will change, up or down, as BPA's overall costs change, but it will not change as a result of rate design changes.

(c) The price for the 1500 aMW of service will be established by combining the 1000 aMW(?) described in (b), with additional energy purchased on behalf of the DSI's with the costs of these purchases, as determined in the Rate Case, passed directly through to the DSI's. This calculated price will be the basis of all Subscription offers to the DSI's. The amounts shown with a "?" will be adjusted in preparing the Initial

Proposal so that the price for the 1500 aMW is $23.50 per MWh.

APPENDIX F

[SEAL]

Department of Energy

Bonneville Power Administration
P.O. Box 3621
Portland, Oregon 97206-3621

POWER BUSINESS LINE

June 18, 1999

In reply refer to: P-6

Mr. Brett Wilcox
President
Goldendale Aluminum Company
85 John Day Dam Road
Goldendale, WA 98620-9302

Dear Mr. Wilcox:

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move forward with the Compromise Approach proposal in the Rate Case Initial Proposal. Without concurrence by the DSIs on the following issues, BPA will not be able to move forward with that proposal. Instead, the Initial Proposal will have to reflect an earlier proposal (the so-called Targeted Augmentation Approach) BPA placed before the DSIs on April 26, 1999.

BPA needs Goldendale Aluminum Company to agree to the following:

1. BPA will propose the Compromise Approach in the Initial Proposal for the Rate Case, and Goldendale Aluminum Company will support the Compromise Approach throughout the Rate Case so long as BPA continues to do so. The intent of the average rate and the variable rate in this proposal is to collect $23.50 per megawatt-hour on average over the rate period, as adjusted pursuant to the Compromise Approach. Goldendale Aluminum Company may submit evidence on the record during the rate proceeding addressing the reasonableness of the aluminum price forecast, and argue for adjustments as provided for in the Compromise Approach.

2. For as long as BPA is proposing the Compromise Approach in the Rate Case, Goldendale Aluminum Company will support the Compromise Approach in the rate case, and will so indicate in discussions outside the Rate Case venue. Goldendale Aluminum Company may describe publicly the positions it is taking in the Rate Case.

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Investor-Owned Utilities for FY2002-2006 as provided in BPA's Subscription Strategy. BPA will propose in the Rate Case a procedural method by which Goldendale Aluminum Company may preserve its ability to litigate within the limitations of this letter.

4. At the end of the Rate Case, if the Compromise Approach is substantially sustained in BPA's Rate Case Final Record of Decision, Goldendale Aluminum Company will not legally challenge the Compromise Approach, but Goldendale Aluminum Company may challenge BPA's decisions regarding adjustments as provided for in the Compromise Approach pursuant to Paragraph 1 above.

5. If the Compromise Approach is substantially sustained in the Rate Case Final Record of Decision, and Goldendale Aluminum Company desires to purchase power from BPA at the resulting rate, a condition of such sale is that Goldendale Aluminum Company will not file a lawsuit challenging the sale of power under the Subscription Strategy to serve the residential and small farm loads of the Investor-Owned Utilities, or the rates for such sales, for the FY2002-2006 period, unless a party representing the interests of the residential and small farm customers of the investor-owned utilities files a lawsuit challenging the power sales or rates for service to the DSIs.

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Sincerely,

/s/ Paul E. Norman
Paul E. Norman
Senior Vice President
Power Business Line

Enclosure

Concur: /s/ Gerald F. Miller

Name: /s/ Gerald F. Miller
(Print or type) Vice President

Company Goldendale Aluminum Co.

WP-02-E-BPA-09
Attachment 1
Witnesses: Sydney Berwager, Stephen Oliver,
and Harry Clark

June 17, 1999

COMPROMISE APPROACH

This is the approach that BPA would propose as part of the Initial Proposal for the upcoming rate case if the DSIs are willing to support it.

Product: Firm Power Block (without load following), take-or-pay

Amount: 1,500 aMW, approximately 75 percent of FY 1997-2001

Allocation: Based on the relative amounts of IP purchases in the FY 1997-2001 time period

Price: $23.50 per MWh (for undelivered, 100 percent annual load factor power)

$23.00 per MWh with Conservation and Renewables discount (C&R discount)

C&R Discount:

The Company will be eligible for discount ($0.50/MWh), subject to the same standards and procedures as utilities participating in the C&R discount program.

Flexible IP Index (Variable) Rate Design:

The following Variable Rate design, applicable to aluminum smelter operations, will be used to the Initial Proposal for the upcoming rate case.

Floor Rate:	$19.00 ($18.50 w/C&R discount)
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Ceiling Rate:	$28.50 ($28.00)

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The only exception to this take-or-pay obligation is available to DSI's who, at the time they sign a contract, elect to take service under the Variable Rate, and simultaneously elect the Floor Rate Curtailment Take-or-Pay Waiver option. For any company making this dual election, if the company reduces load at the time aluminum prices are such that the electric price is at the Floor Rate, the Company will reduce its take-or-pay obligation on BPA. The amount of the take-or-pay reduction will be equal to the pro-rate share of plant load that had been served by BPA just prior to the reduction in plant load. Once having reduced load under this approach, the Company will have given up its contract right to restore service to the curtailed load under the Compromise Approach agreement. The amount of power subject to stranded cost recovery charges (see Stranded Cost, below) will not be reduced by the amount of this take-or-pay reduction.

Stranded Cost:

Sales under this arrangement would be subject to the power Cost Recovery Adjustment Clause (CRAC). The CRAC will be added to the Variable Rate and the Average Rate. With regard to other stranded cost mechanisms, the power sales contract will be explicit that, for as long as the Company continues to purchase cost-based power from BPA, the new contract supercedes existing contracts and the Company will be subject to same exposure as BPA's utility customers purchasing subscription power.

Dividend:

Sales under this Compromise Approach arrangement would be eligible for a share of the potential "dividend" in the same way that Subscription sales to other customers would make those customers eligible for a share of the dividend.

Amount and Cost Basis:

(a) Under this Compromise Approach, 1,500 aMW will be available to the DSI's. 1,500 aMW was selected set because it represents a large portion (approximately three-fourths) of the load placed on BPA during the previous five years at a cost-based.

(b) Of that 1,500 aMW amount, 1,000 aMW(?) will be served using a cost-basis approach consistent with the IP-PF relationship of 7(c)(2) of the Pacific Northwest Power Act. BPA expects to serve 200 aMW out of its critical inventory. An additional 800 aMW (an amount equal to approximately 40 percent of the amount of secondary energy BPA expects to have in an average year during this period) will also be made available. (BPA is not committing to serve DSI loads with secondary energy; instead, BPA intends to augment its firm inventory as appropriate to serve this load without decreasing the amount of secondary energy available for sale at market prices.) The cost basis for this component of DSI service will change, up or down, as BPA's overall costs change, but it will not change as a result of rate design changes.

(c) The price for the 1500 aMW of service will be established by combining the 1,000 aMW(?) described in (b), with additional energy purchased on behalf of the DSI's with the costs of these purchases, as determined in the rate case, passed

directly through to the DSI's. This calculated price will be the basis of all Subscription offers to the DSI's. The amounts shows with a "?" will be adjusted in preparing the Initial Proposal so that the price for the 1,500 aMW is $23.50 per MWh.

6_18package.doc)

APPENDIX G

ALCOA INC. SUBSIDIARIES
LESS THAN WHOLLY OWNED ENTITIES

A.F.P. Pty. Limited
AAC Holdings Company
Abalco S.A.
ACAP Australia Pty Ltd
ACAP Singapore Pte Ltd
Adela Investment Company S.A.
AFL do Brasil Ltda.
AFL Hungary Kft
AFL Svenska
AFL Telecomunicaciones De Mexico, S. de R.L. de C.V.
AFL UK Ltd.
Alcatel Cabos Brasil S/A
Alcoa (Shanghai) Aluminum Products Company Limited
Alcoa ACC Industrial Chemicals Ltd.
Alcoa Aluminio S.A.
Alcoa Automotive Castings
Alcoa Automotive Castings Scandanavian Casting Center ANS
Alcoa Caribbean Alumina Holdings, L.L.C.
Alcoa Chemie GmbH
Alcoa Chemie Nederland B.V.
Alcoa Closure Systems International (Tianjin) Co., Ltd.
Alcoa Fios E Cabos Eletricos S.A.
Alcoa Fujikura de Juarez, S.A. de C.V.
Alcoa Fujikura GmbH
Alcoa Fujikura Holding, L.L.C.
Alcoa Fujikura Ireland Limited
Alcoa Fujikura Ltd.
Alcoa Fujikura Ltd. Venezeula, C.A.
Alcoa Fujikura Manufacturing (Canada) Ltd.
Alcoa Fujikura Securities Corporation
Alcoa Kasei Limited
Alcoa Kobe Transportation Products, Inc.

Alcoa Latin American Holdings Corporation
Alcoa Minerals of Jamaica, L.L.C.
Alcoa Moerdijk B.V.
Alcoa of Australia (Asia) Limited
Alcoa of Australia Limited
Alcoa Remediation Management, Inc.
Alcoa Specialty Chemicals, Inc.
Alcoa Steamship Company, Inc.
Alcoa World Alumina LLC
Alcoa-Bridgestone Services, L.L.C.
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Corporate Insurance and Reinsurance Company Limited
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(2)

No. 99-1556

Supreme Court, U.S.
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In The

Supreme Court of the United States

ALCOA INC. and VANALCO, INC.,

Petitioners,

v.

BONNEVILLE POWER ADMINISTRATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RULE 15(8) SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI

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RULE 15(8) SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI

A substantive issue in Case No. 99-1556 (*Alcoa Inc. and Vanalco, Inc. v. Bonneville Power Administration*) is whether BPA can condition sales of power by precluding users from any effort to lobby Congress in opposition to a preferred BPA distribution plan. A preliminary jurisdictional issue is whether either a district court or a court of appeals can decide the constitutional question.

We now discover that this Court has on April 3, 2000, granted certiorari in the Second Circuit case of *Velazquez v. Legal Services Corp.*, 164 F.3d 757 (2d Cir. 1999). The case numbers here are 99-603 and 99-960. The precise point in that case is whether the government can condition a grant on a viewpoint restrictive restraint on lobbying, exactly what the "Compromise Approach" in the instant case requires here, as is fully set forth in our Petition.

We respectfully suggest that the instant case either be granted certiorari or otherwise be held in light of Nos. 99-603 and 604.

RESPECTFULLY SUBMITTED this 11th day of April, 2000.

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(3)

No. 99-1556

In the Supreme Court of the United States

ALCOA INC. AND VANALCO INC., PETITIONERS

v.

BONNEVILLE POWER ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly dismissed for lack of jurisdiction petitioners' claim that the Bonneville Power Administration violated their First Amendment rights.

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In the Supreme Court of the United States

No. 99-1556

ALCOA INC. AND VANALCO INC., PETITIONERS

v.

BONNEVILLE POWER ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The orders of the court of appeals (Pet. App. 1a-2a, 3a-4a) are unreported. The order of the district court (Pet. App. 5a) is unreported.

JURISDICTION

The orders of the court of appeals were entered on February 9, 2000. The petition for a writ of certiorari was filed on March 22, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Bonneville Power Administration (BPA) is a federal agency within the United States Department of Energy that markets and transmits

federally-generated electricity in several States in the western United States. See 16 U.S.C. 832a(a). The power is primarily generated by a series of dams along the Columbia River. See *Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 382 (1984). BPA sells low-cost hydroelectric power to public utilities and entities, private investor-owned utilities (IOUs), and direct-service industrial customers (DSIs). *Id.* at 382, 384. DSIs are primarily aluminum smelters, such as petitioners, that purchase electric power directly from BPA. See Power Subscription Strategy, 64 Fed. Reg. 149, 151 (1999).

Several statutes govern BPA's operations. These include the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839 *et seq.* (Northwest Power Act), the Federal Columbia River Transmission System Act, 16 U.S.C. 838 *et seq.*, the Act of Aug. 31, 1964, 16 U.S.C. 837 *et seq.*, and the Bonneville Project Act of 1937, 16 U.S.C. 832 *et seq.* Pursuant to these statutes, BPA, *inter alia*, must set rates for its electric power at a level that will meet costs and repay any federal debt incurred in building the projects included in the Federal Columbia River Power System, 16 U.S.C. 838g; market power "with a view to encouraging the widest possible diversified use of electric power at the lowest possible rates to consumers consistent with sound business principles," 16 U.S.C. 838g; support energy conservation, 16 U.S.C. 839; and act to protect the fish and wildlife of the Columbia River basin, 16 U.S.C. 839b (1994 & Supp. IV 1998). See *Association of Pub. Agency Customers, Inc.* v. *BPA*, 126 F.3d 1158, 1164 (9th Cir. 1997).

2. In 1981, Congress required the BPA to offer long-term sales contracts to its customers, not to exceed a twenty-year term. 16 U.S.C. 839c(g)(1), 832d(a). In

anticipation of the expiration of those contracts in 2001, and to facilitate the offering of replacement contracts, BPA sought input from a wide range of interested and affected groups and individuals beginning in 1996. See 64 Fed. Reg. at 149, 151. The result of this public process was the "Power Subscription Strategy," a comprehensive plan issued in December 1998, to guide BPA in developing new power sales contracts while fulfilling all of its statutory mandates. See 64 Fed. Reg. at 149.

The Subscription Strategy did not address the specific price or quantities of power to be sold to the DSIs upon the expiration of their current power sales contracts. Subsequently, the BPA, with the help of the DSIs, developed a proposal called the "Compromise Approach." See Pet. App. 91a-95a. The Compromise Approach proposed a price and allocation of power that BPA would offer to the DSIs post-2001, based on each DSI's "Industrial Firm Power" purchases from BPA under their current agreements, between fiscal years 1997 and 2001.[1] *Id.* at 91a. The BPA offered to include this price and allocation proposal for service to the DSIs as part of BPA's Initial Proposal in an upcoming Rate Case "if the DSIs are willing to support it." *Ibid.*; 64 Fed. Reg. at 44,318 (announcing BPA's upcoming Rate Case).

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[1] Although BPA may elect to serve the DSIs, it is not required to do so after 2001. See 16 U.S.C. 839c(d)(1); H.R. Rep. No. 976, 96th Cong., 2d Sess. Pt. I, at 61 (1980) ("[S]ection 5(d) authorizes the Administrator to sell power to existing direct service industrial customers that have a BPA contract at the date this bill is enacted. Initial long-term 20-year contracts are to be offered by BPA to these customers in accordance with section 5(g). In return for these new contracts, the DSI's would have to agree to terminate their current contracts. Subsequent contracts for these DSI's are *authorized but not mandated.*") (emphasis added).

In exchange for its agreement to include the Compromise Approach proposal in the upcoming Rate Case, the BPA asked the DSIs to refrain from challenging or otherwise undermining the Compromise Approach proposal. In particular, BPA asked the DSIs to agree to: (1) support the proposals in the Compromise Approach throughout the Rate Case, as long as BPA did so; (2) indicate that they do so outside the Rate Case venue; (3) not oppose the elements of the proposal relating to rates for service to Investor-Owned Utilities; (4) not legally challenge the Compromise Approach at the end of the Rate Case if it is sustained in BPA's Rate Case Final Record of Decision (although the DSIs could challenge BPA's decisions regarding adjustments of rates); (5) not file a lawsuit challenging the sale of power to Investor-Owned Utilities if the Compromise Approach is substantially sustained in the Rate Case Final Record of Decision; and (6) withdraw a lawsuit challenging the Subscription Strategy currently filed in the Court of Appeals for the Ninth Circuit, if the Compromise Approach is substantially sustained in the Rate Case Final Record of Decision. Pet. App. 88a-90a.

Most of the DSIs accepted the Compromise Approach proposal and agreed to BPA's requests. Petitioners did not. Pet. 5. Petitioners have been full participants in BPA's Rate Case and have used the Rate Case to challenge the validity of the Compromise Approach proposal, and to raise other issues of concern to them. The rate-making proceedings began on August 24, 1999, and concluded on May 10, 2000, with the issuance of BPA's Record of Decision. The Compromise Approach proposal was a relatively small part of BPA's rate proceeding. 64 Fed. Reg. at 44,318. The Federal Energy Regulatory Commission (FERC) will

review BPA's decision, 16 U.S.C. 839e(i)(5) and (6), and the decision will be deemed final for purposes of judicial review when it is confirmed and approved by FERC, 16 U.S.C. 839f(e)(4)(D).

3. During the Rate Case, in which they were participants, petitioners brought suit in both federal district court and the court of appeals, seeking to enjoin BPA's rate-making proceeding, to enjoin BPA from entering into subscription contracts with its customers, to enjoin "implementation" of the Compromise Approach, and to require BPA to commence a new Rate Case. See Petitioner Vanalco Inc.'s Motion for Preliminary Injunction to Enjoin Power Rate Case 1. Petitioners asserted, *inter alia*, that the Compromise Approach had infringed their First Amendment rights to petition the government for redress of grievances. *Id.* at 15.

The district court issued an order dismissing petitioners' claims for lack of jurisdiction. Pet. App. 5a. The court of appeals affirmed the district court's dismissal, noting that the questions raised were "so insubstantial as not to need further argument." *Id.* at 3a-4a. The court of appeals also issued an order dismissing petitioners' direct appeal for lack of jurisdiction. *Id.* at 1a-2a.[2]

ARGUMENT

The rulings of the court of appeals are correct and do not conflict with the decisions of this Court, or of any other court of appeals. Accordingly, further review is not warranted.

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[2] On March 31, 2000, after the petition for a writ of certiorari was filed, petitioners filed an application to Justice O'Connor for a stay of the rate-making proceedings, pending disposition of the petition. The stay was denied by order of April 6, 2000.

A. The court of appeals correctly affirmed the district court's dismissal of petitioners' claims for lack of jurisdiction, and correctly determined that it lacked jurisdiction over petitioners' direct appeal.

The district court lacked jurisdiction over petitioners' claims of unconstitutional action on the part of BPA. Section 9(e)(5) of the Northwest Power Act, 16 U.S.C. 839f(e)(5), vests jurisdiction in the courts of appeals to review "[s]uits to challenge the constitutionality of this chapter, or any action thereunder."[3] The Court of Appeals for the Ninth Circuit has consistently held that its jurisdiction over such suits is exclusive and that the district court lacks jurisdiction to consider such challenges. See *Public Util. Comm'r* v. *BPA*, 767 F.2d 622, 627 (9th Cir. 1985) (Kennedy, J.); see also *Central Mont. Elec. Power Coop., Inc.* v. *Administrator of the BPA*, 840 F.2d 1472, 1475 (9th Cir. 1988) (district court has jurisdiction over nonconstitutional suits challenging

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[3] The statute provides:

> Suits to challenge the constitutionality of this chapter, or any action thereunder, final actions and decisions taken pursuant to this chapter by the Administrator or the Council, or the implementation of such final actions, whether brought pursuant to this chapter, the Bonneville Project Act [16 U.S.C. 832 *et seq.*], the Act of August 31, 1964 (16 U.S.C. 837-837h), or the Federal Columbia River Transmission System Act (16 U.S.C. 838 and following), shall be filed in the United States court of appeals for the region. * * * Such court shall have jurisdiction to hear and determine any suit brought as provided in this section. The plan and program, as finally adopted or portions thereof, or amendments thereto, shall not thereafter be reviewable as a part of any other action under this chapter or any other law. Suits challenging any other actions under this chapter shall be filed in the appropriate court.

16 U.S.C. 839f(e)(5).

actions taken by agencies other than BPA pursuant to the Act); *Pacific Power & Light Co.* v. *BPA*, 795 F.2d 810, 815-816 (9th Cir. 1986) (same). Furthermore, the court of appeals has held that the Northwest Power Act "does not permit district court jurisdiction where the effect of an action is to challenge a BPA proceeding, the substance of which eventually will be subject to direct review" by the court of appeals.[4] See *id.* at 815. Because petitioners brought a constitutional challenge to BPA's rate-making proceeding, and because that proceeding will eventually be subject to direct review by the court of appeals, the district court correctly determined that it lacked jurisdiction to consider petitioners' challenge. See, *e.g.*, *Public Util. Comm'r*, 767 F.2d at 627. The court of appeals correctly

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[4] District courts have uniformly dismissed suits challenging BPA actions for lack of jurisdiction, holding that such suits are subject to exclusive review by the appropriate court of appeals. The court of appeals has uniformly affirmed these dismissals. See *National Wildlife Fed'n* v. *Johnson*, 548 F. Supp. 708 (D. Or. 1982), aff'd, 709 F.2d 1310 (9th Cir. 1983); *Public Util. Comm'r* v. *BPA*, 583 F. Supp. 752 (D. Or. 1984), aff'd, 767 F.2d 622 (9th Cir. 1985); *Public Power Council* v. *Johnson*, 589 F. Supp. 198 (D. Or. 1984); *Pacific Power & Light Co.* v. *BPA*, 589 F. Supp. 539 (D. Or. 1984), aff'd, 795 F.2d 810 (9th Cir. 1986); *City of Seattle* v. *Johnson*, 600 F. Supp. 306 (D. Or. 1984); *Central Mont. Elec. Power Coop., Inc.* v. *Administrator of the BPA*, 656 F. Supp. 781 (D. Mont. 1987), aff'd in part and appeal dismissed in part, 840 F.2d 1472 (9th Cir. 1988); *Bowers* v. *Jura*, 749 F. Supp. 1049 (W.D. Wash. 1990). Congress made clear in enacting this legislation that "suits to challenge the constitutionality of the act or any action thereunder and final actions and decisions taken pursuant to the act by either the BPA or the council shall be filed in the U.S. court of appeals for the region. This would include rate matters." 126 Cong. Rec. 29,813 (1980) (statement of Rep. Dingell).

affirmed, and that decision does not warrant this Court's review.

The court of appeals also correctly determined that it lacked jurisdiction to hear petitioners' direct appeal. The jurisdiction of the court of appeals extends only to final actions of the BPA, 16 U.S.C. 839f(e)(1), and there is no "final action" for the court of appeals to review at this time. See, *e.g.*, *Northwest Resource Info. Ctr., Inc.* v. *National Marine Fisheries Serv.*, 25 F.3d 872, 875 (9th Cir. 1994). BPA's rate determinations are deemed final only upon confirmation and approval by FERC. 16 U.S.C. 839f(e)(4)(D). Although BPA's portion of the rate-making proceeding at issue in this case has concluded, FERC has not reviewed and approved BPA's rate determination, so the "final action" requirement has not been met. See *Public Utils. Comm'n* v. *FERC*, 814 F.2d 560, 561 (9th Cir. 1987) (BPA's alleged unconstitutional failure to hold required hearing held not reviewable in court of appeals until FERC ruled on new BPA rate schedule); *Public Util. Comm'r*, 767 F.2d at 629 (constitutional challenge to BPA proceeding not reviewable until BPA's final rate methodology reviewed and approved by FERC). Therefore, the court of appeals correctly determined that it lacked jurisdiction to consider petitioners' challenge and that determination does not warrant review.

B. Petitioners contend that because their constitutional rights have been violated and those violations will cause "irreparable injury," an exception to the finality requirement should apply. Pet. 17, 22. This claim lacks merit and does not warrant this Court's review.

1. First, petitioners' claim that BPA's action violates their First Amendment rights does not entitle them to review when that action is not final. As the Ninth

Circuit has correctly recognized, the general rule is that challenges to agency proceedings, whether based on constitutional claims or otherwise, must await final agency action for review, when, as here, the governing statute so requires. See *Public Util. Comm'r*, 767 F.2d at 630. Until FERC passes final judgment on BPA's rate determination, that determination is not yet final for purposes of review by the court of appeals. See *Public Utils. Comm'n*, 814 F.2d at 561; *California Energy Comm'n* v. *Johnson*, 767 F.2d 631, 633-634 (9th Cir. 1985) (challenge to a BPA rate order on ground that BPA failed to follow its ratemaking procedures must await final FERC approval). Petitioner does not contend that there is a conflict among the Circuits on this point, and there is none. Furthermore, this approach is consistent with this Court's general presumption that judicial review ordinarily must await the conclusion of agency proceedings. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242 (1980); *Abbott Lab.* v. *Gardner*, 387 U.S. 136, 148-149 (1967).

2. Second, an exception to the finality requirement for review of agency proceedings has been recognized only in rare circumstances where agency action has clearly violated important statutory or constitutional rights. See, *e.g.*, *Leedom* v. *Kyne*, 358 U.S. 184, 187-188 (1958); *Peter Kiewit Sons' Co.* v. *United States Army Corps of Engineers*, 714 F.2d 163, 168-169 & n.33 (D.C. Cir. 1983); see also *Public Util. Comm'r*, 767 F.2d at 630 (in an "extreme case", an action may be challengeable by suit on constitutional grounds before it is final). Those circumstances are not present here. Petitioners' First Amendment claims are without foundation, as is their claim of irreparable injury. As the court of appeals correctly observed, petitioners' claims are "insubstantial." Pet. App. 4a. Accordingly, the

court correctly held that ordinary finality requirements apply.

Contrary to petitioners' contention, the Compromise Approach does not violate petitioners' First Amendment right to petition the government for redress. Pet. 6-7. Petitioners did not agree to the Compromise Approach and therefore are not bound by any of its restrictions (which are of limited scope and duration). Petitioners were free to challenge the Compromise Approach during BPA's rate-making proceeding, to petition Congress, to speak publicly about their views of the rates proposed therein, and are free to bring a legal challenge to the Compromise Approach when the appropriate court has jurisdiction to consider it.

Petitioners further argue that by "silencing" those DSIs who agreed to the proposal, BPA's Compromise Approach has prevented petitioners from assembling with "their natural allies" in pursuing redress before the agency or Congress or otherwise. Pet. 14. This argument is similarly without merit. As we have explained, the Compromise Approach does not bind petitioners in any way. It was not BPA's proposal of the Compromise Approach which prevented petitioners from associating with their fellow DSIs, but the DSIs' voluntary decision to accept the proposal and petitioners' voluntary decision to reject it. Moreover, in this context, the other DSIs are not in fact allied with petitioners, because they support a proposed price and allocation of power that petitioners do not.[5] Also, as a participant in the rate-making proceedings, petitioners

[5] While petitioners claim that they and the other DSIs represent a "political bloc," Pet. 7, these corporations have discrete economic interests and frequently disagree with one another, as this case demonstrates.

have continued to associate each day with their fellow DSIs, and indeed to raise the very issues that are the subject of this litigation. See 64 Fed. Reg. at 44,322 ("parties to the rate case may raise and discuss any issues regarding BPA's proposal to serve the DSIs, including any issues regarding the potential effects of this proposal on BPA's rates").

Petitioners also suggest that the Compromise Approach violates the rights of the DSIs that agreed to its terms, because those entities are required to forgo expressing concerns or objections in the rate-making proceedings and elsewhere, and to "abandon their First Amendment right to petition any branch of the government, including specifically the Congress." Pet. i. This claim is without merit. Petitioners fail to establish standing to assert the First Amendment rights of the other DSIs, particularly in an attempt to seek judicial repudiation of an agreement those persons have voluntarily chosen to make. See *NAACP* v. *Alabama*, 357 U.S. 449, 459 (1958) (generally, parties may rely only on constitutional rights personal to themselves). In any event, the Compromise Approach proposal does not abridge the First Amendment rights of the DSIs who agreed to it. The Compromise Approach was entered into voluntarily, and was simply an agreement to support an Initial Proposal in BPA's rate case, and to refrain from challenging it if it was sustained in that case. The DSIs, sophisticated corporations, knowingly and voluntarily agreed to support that proposal, and the Compromise Approach did not violate their First Amendment rights.

C. Finally, petitioners contend that the Compromise Approach will irreparably harm their economic interests without interlocutory review. Pet. 20. Petitioners claim that because they did not accept the

Compromise Approach, they will be allocated less power and required to pay higher prices for it. *Ibid.* However, until FERC confirms and approves BPA's rates, questions of price and allocation of power remain administratively unresolved. Petitioners' alleged harm is therefore speculative, and their claims do not warrant review by this Court.

Petitioners thus failed to establish a clear violation of their constitutional rights or a threat of irreparable injury to their interests. Accordingly, the court of appeals correctly affirmed the district court's dismissal of petitioners' claims and correctly dismissed their claims on direct appeal.[6]

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[6] Petitioners have filed a supplement to their petition urging that, in the alternative to granting certiorari, this case should be held pending the outcome of *United States* v. *Velazquez*, cert. granted, 120 S. Ct. 1553 (2000) (No. 99-960). At issue in *Velazquez*, however, is whether certain statutory provisions, which preclude recipients of Legal Services Corporation funds from participating in "litigation, lobbying or rulemaking, involving an effort to reform a Federal or State welfare system," violate the First Amendment. Pub. L. No. 104-134, § 504(a)(16), 110 Stat. 1321-55. The instant case does not involve such a statutory restriction, but rather a proposal which two corporations declined to accept, leaving them free to litigate, lobby or otherwise publicly discuss the matters at issue. It also presents jurisdictional issues not present in *Velazquez*. *Velazquez* thus presents no reason to postpone action on the petition for certiorari at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2000

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Supreme Court, U.S.
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No. 99-1556

In The

Supreme Court of the United States

ALCOA INC., and VANALCO, INC.,

Petitioners,

v.

BONNEVILLE POWER ADMINISTRATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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MISCELLANEOUS

13 James Wm. Moore, Moore's Federal Practice § 65.22[1][b] (Daniel R. Coquillette et al., eds., 3d ed. 2000) 1

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Petitioners ask this Court to review the determination of the Circuit Court that neither it nor the District Court has the jurisdiction to provide temporary relief to parties suffering irreparable harm of constitutional stature.

Petitioners' fundamental position is that, given their well-founded allegations of First Amendment violations, "*some* court has power" to presently address these constitutional questions and provide temporary relief. (Pet. at 23.) Petitioners rely on *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972), for the proposition that the First Amendment guarantees the right of access to the courts (Pet. at 13); on *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965), for the constitutional requirement of a timely determination of First Amendment claims (Pet. at 13); and on the teaching of *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976), that deprivation of First Amendment rights, "for even minimal periods of time," by itself constitutes irreparable injury. (Pet. at 17.)[1] The Government offers no responsive argument in this

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[1] Although *Elrod* is a plurality opinion and some members of the Court disagreed with the plurality's views on the practice of patronage dismissals, no member of the Court disputed that the deprivation of First Amendment rights by itself constitutes irreparable harm. Further, the Circuit Courts have without exception followed *Elrod*'s teaching on this point. *See 13 James Wm. Moore, Moore's Federal Practice* § 65.22[1][b], at 65-45 n.13 (Daniel R. Coquillette et al., eds., 3d ed. 2000).

regard; indeed it includes no mention of these authorities, among others.[2]

> *Elrod* presented to this Court the question:
>
> "[W]hether public employees who allege that they were discharged or threatened with discharge solely because of their partisan political affiliation or nonaffiliation state a claim for deprivation of constitutional rights secured by the First and Fourteenth Amendments." 427 U.S. at 349, 49 L. Ed. 2d at 551.

The Court concluded that the practice of patronage dismissals violates the First Amendment and that the public employees had "stated a valid claim for relief." 427 U.S. at 373, 49 L. Ed. 2d at 565.

In the instant case there can be no question that Petitioners' allegations state a claim for First Amendment violations and that, under *Elrod*, Petitioners are likely entitled to temporary relief. Given this, surely it must be the case that some federal court – the District Court if not the Circuit Court – has jurisdiction to provide such relief. The Government provides no response to this reasoning.

The Government urges that jurisdiction of the Circuit Court "extends only to final actions of the BPA" and that this occurs only upon FERC approval. (Brief in Opp. at 8.) The Government ignores Petitioners' statutory argument that the jurisdictional provision of the Northwest Power Act does not require FERC finality for a constitutional

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[2] The Government mentions, twice, (Brief in Opp. at 5, 9), that there is no conflict in the Circuits. BPA is the Government agency and only the Ninth Circuit has jurisdiction under the Northwest Power Act to review BPA actions.

challenge to BPA action. (Pet. at 18-19.) The Government also ignores Petitioners' position that the Compromise Approach involves contracts for the sale of electrical power and that the Northwest Power Act expressly gives the Circuit Court jurisdiction for direct review of the power contracts. (Pet. at 21.)

The Government acknowledges that "in an 'extreme case' " a governmental action may be challenged on constitutional grounds "before it is final." (Brief in Opp. at 9.) The Government waves away any suggestion that this case could qualify for this exception, relying on the "observ[ation]" of the Ninth Circuit that "petitioners' claims are 'insubstantial.' " (Brief in Opp. at 9.)[3] The Government misrepresents the "observ[ation]" of the Circuit Court in the order that disposed of Petitioners' appeal from the District Court's dismissal for lack of jurisdiction. Petitioners had moved for summary disposition of their appeal to have the jurisdictional issue that the appeal presented considered by the same Motions Panel that had before it the question of the Ninth Circuit's original jurisdiction. When the court granted Petitioners' motion and then summarily affirmed the District Court, it expressed no opinion on the merits of Petitioners' First Amendment claims arising out of the Compromise Approach. (*See* Pet. at 4a.)

The Government urges that there can be no First Amendment violation in this case because Petitioners

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[3] The Government's Brief states: "Petitioners' First Amendment claims are without foundation, as is their claim of irreparable injury. As the court of appeals correctly observed, petitioners' claims are 'insubstantial.' " (Brief in Opp. at 9.)

"did not agree to the Compromise Approach" and were "not bound by any of its restrictions." (Brief in Opp. at 10.) It approaches the astonishing that the Government could believe it can threaten to penalize someone for exercising First Amendment rights – and carry through on its threat – but not thereby violate First Amendment guarantees.[4] Just last week this Court, in an opinion from which no Justice dissented as to the applicable First Amendment principles,[5] underscored that when the Government places content-based burdens on protected expression, it is subject to the same rigorous scrutiny as if it had banned that expression outright. *United States v. Playboy Entertainment Group, Inc.*, No. 98-1682 (May 22, 2000), slip op. at 8.

The Government contends that Petitioners cannot complain that the Compromise Approach deprived their expression of the augmented power of the voices of other DSIs because it was not the Compromise Approach that did this, but rather "the DSIs' voluntary decision to accept" the Compromise Approach. (Brief in Opp. at 10.) This flatly ignores this Court's considerable jurisprudence on the topic of unconstitutional conditions. (*See* Pet. at 14-16.)

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[4] BPA advised Petitioners that unless they agreed to compromise their First Amendment rights, BPA would propose that they receive less power and at a higher rate than those DSIs who signed on to the Compromise Approach. BPA's 2000 Final Power Rate Proposal, issued earlier this month, carries through with this threat.

[5] *See United States v. Playboy Entertainment Group, Inc.*, No. 98-1682, Breyer, J., dissent, slip op. at 1 (U.S. May 22, 2000): "The basic, applicable First Amendment principles are not at issue."

When the Government burdens protected expression, the government bears the burden of proving the constitutionality of its actions. *Playboy*, slip op. at 12. The Government's Brief, however, does nothing to gainsay the serious and substantial nature of Petitioners' claims.

In this posture the Court should grant the Petition and take up whether, by statutory provision or constitutional requirement, the federal courts have the power to address Petitioners' claims and afford temporary relief.

Respectfully submitted,

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